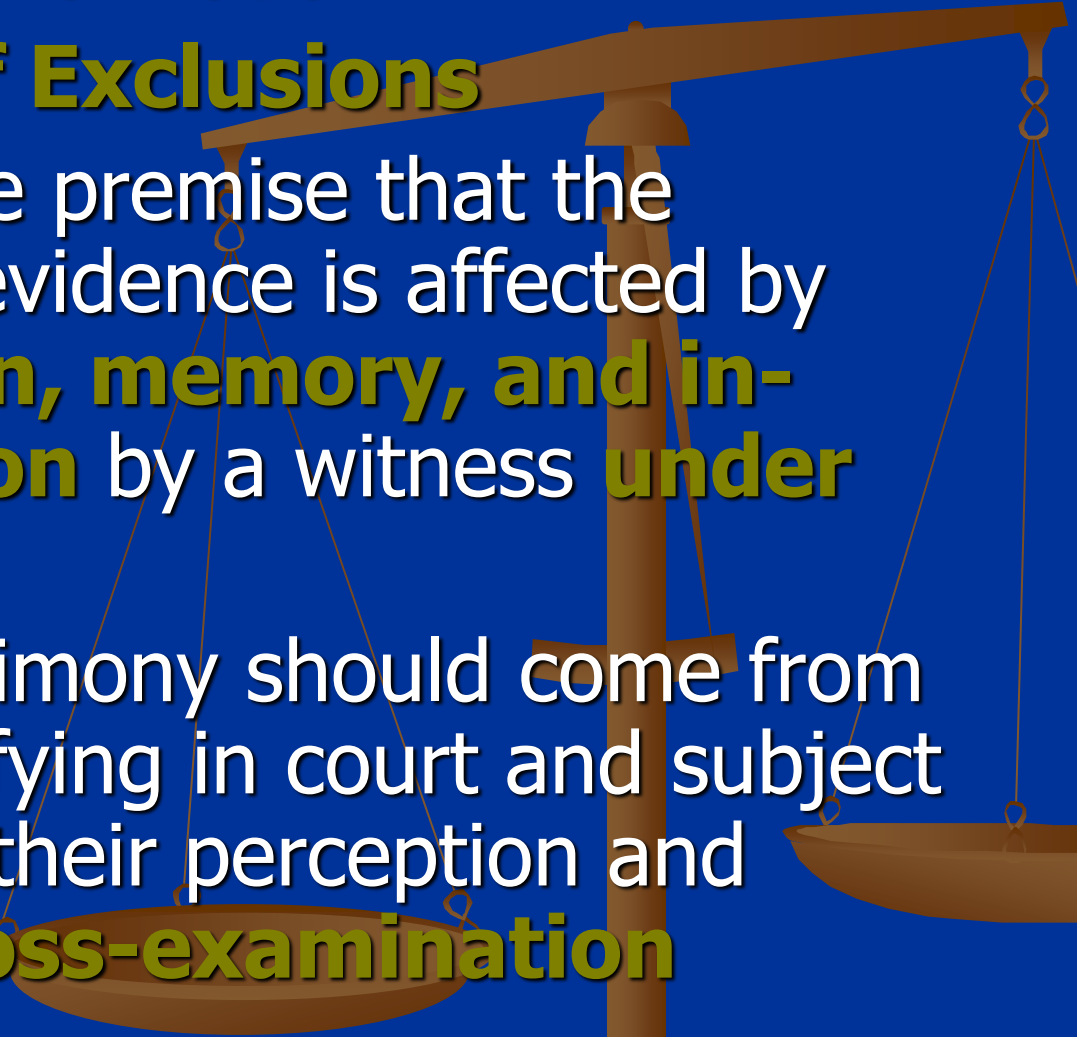


The Hearsay Rule and The Confrontation Clause

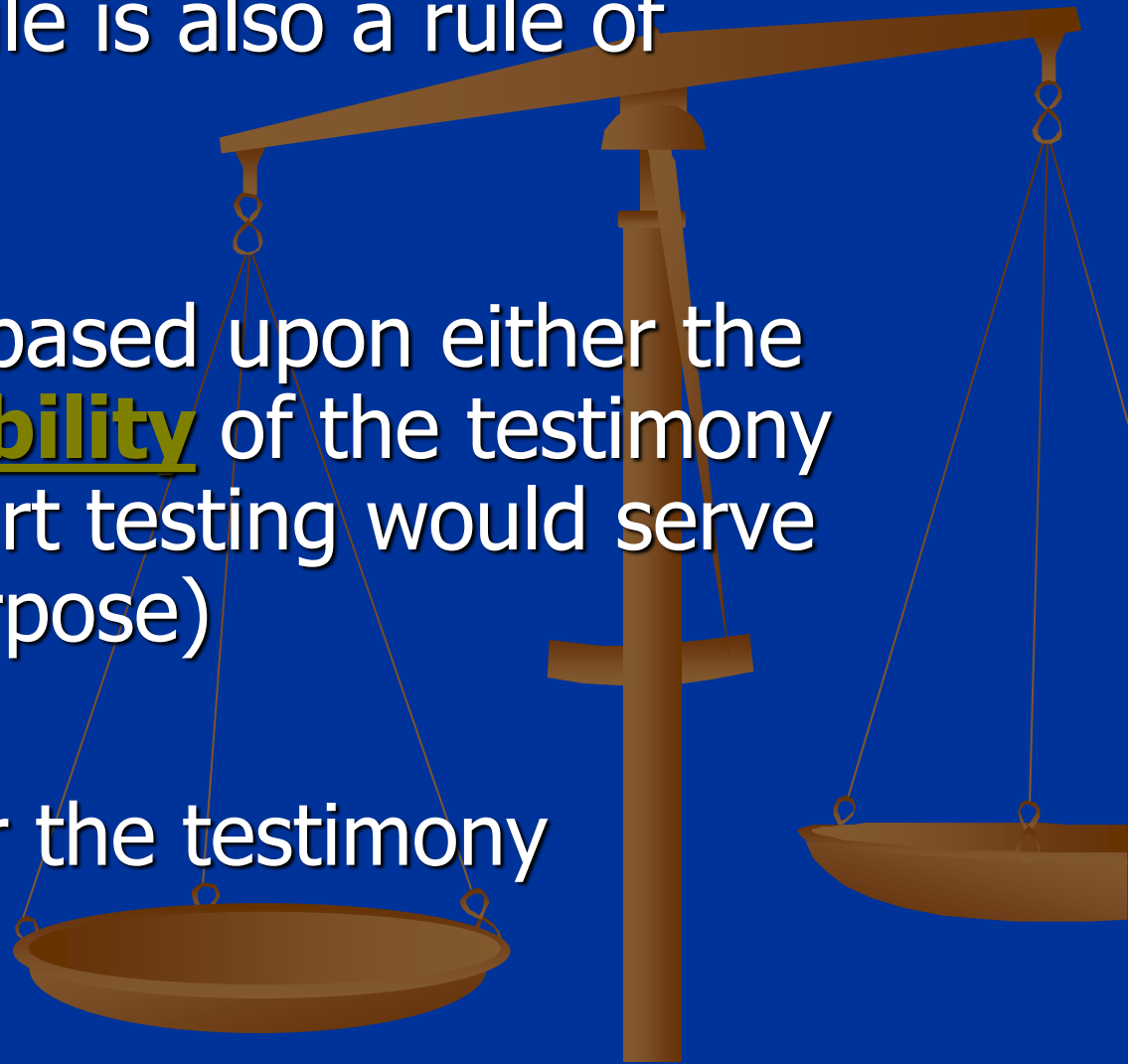


Big Picture

- The Hearsay Rule is about the Repetition of Information
 - It is a **Rule of Exclusions**
 - Founded on the premise that the **reliability** of evidence is affected by the **perception, memory, and in-court narration** by a witness **under oath**
 - Therefore, testimony should come from witnesses testifying in court and subject to a testing of their perception and memory by **cross-examination**
- 

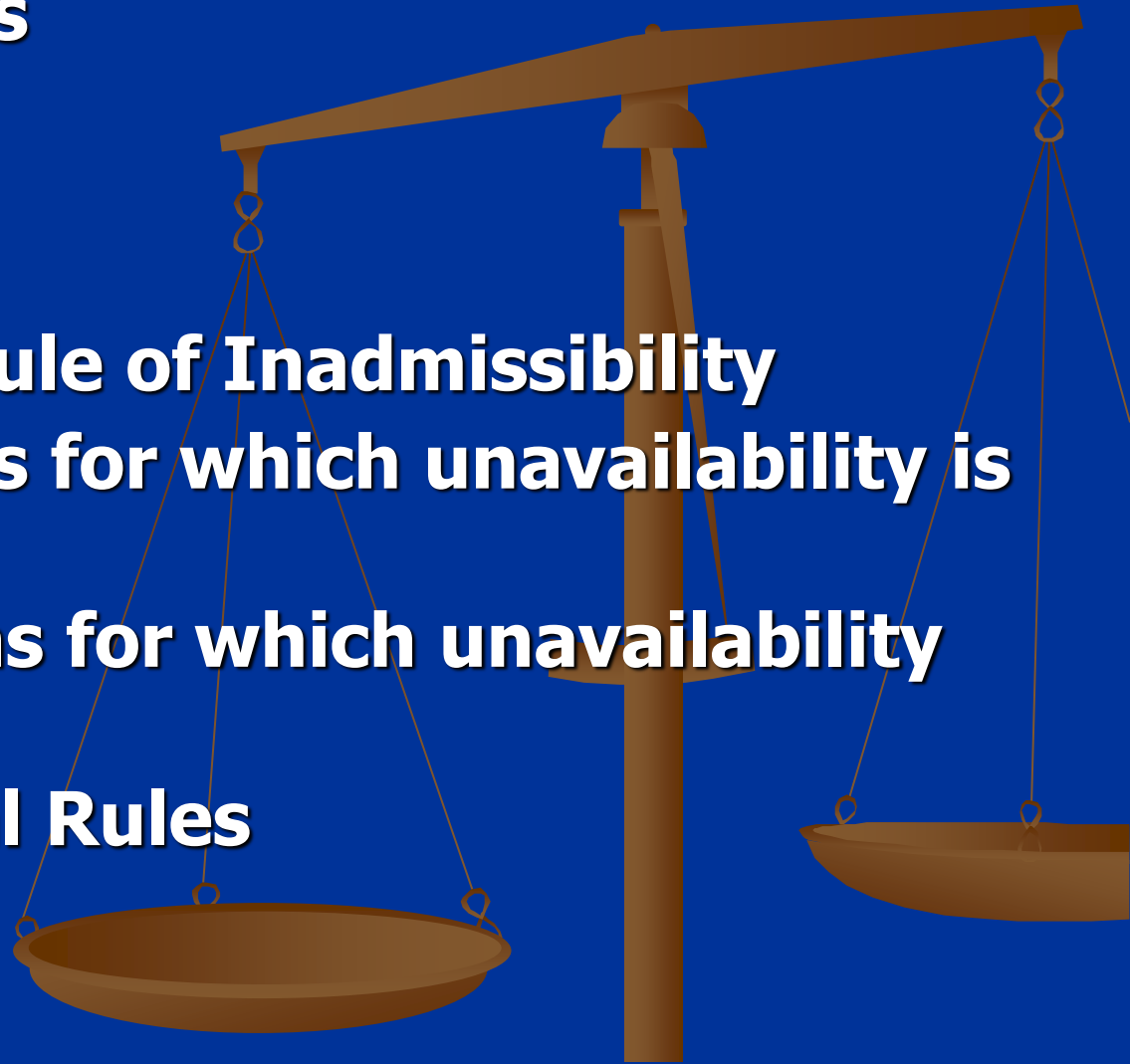
More of the Big Picture

- The Hearsay Rule is also a rule of **Exceptions**
- Exceptions are based upon either the **inherent reliability** of the testimony (thus, an in-court testing would serve little, if any, purpose)
- Or the **need** for the testimony



Outline of the Hearsay Rules

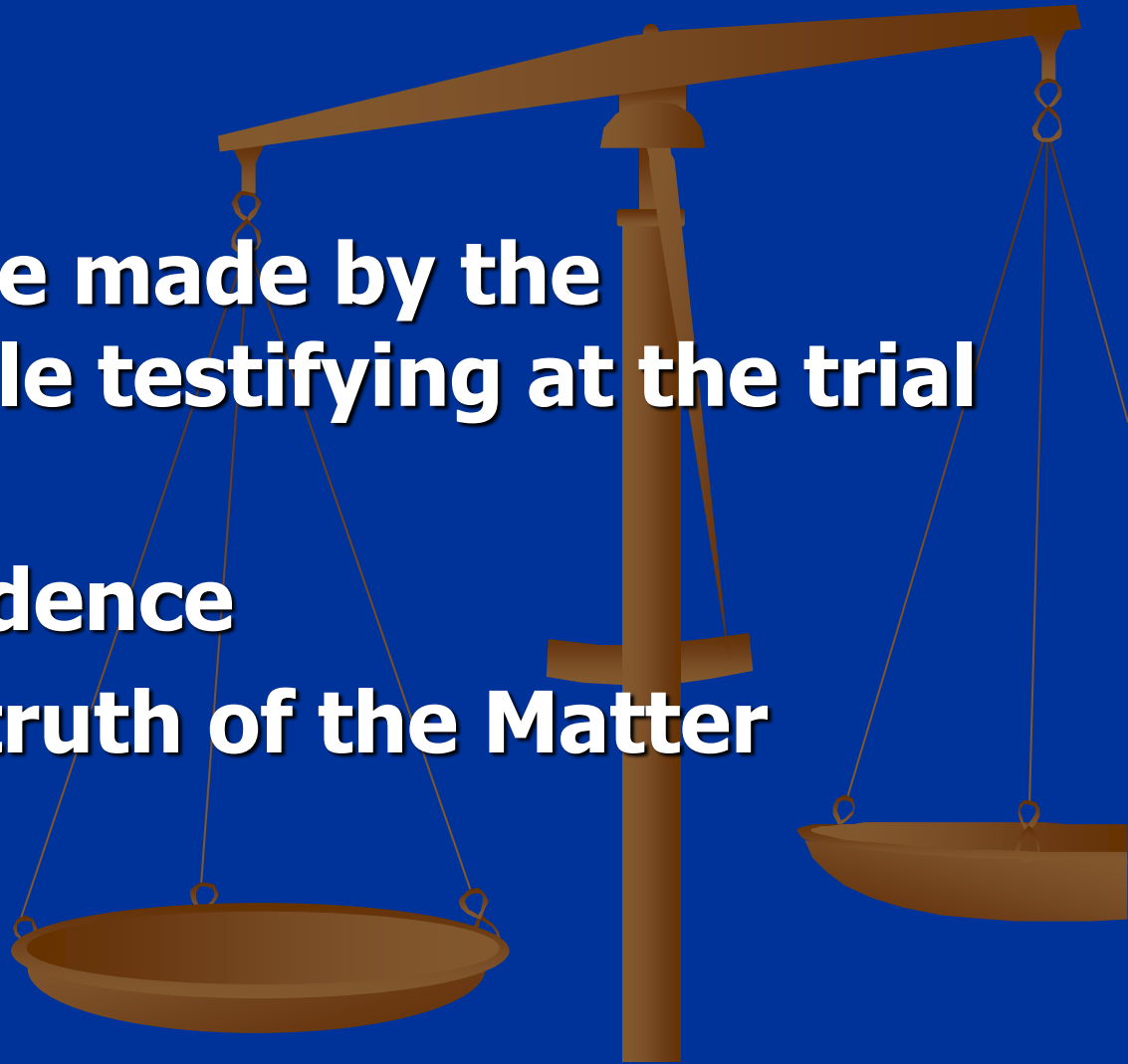
- **801 - Definitions**
 - **Statement (a)**
 - **Declarant (b)**
 - **Hearsay (c)**
- **802 - General Rule of Inadmissibility**
- **803 - Exceptions for which unavailability is irrelevant**
- **804 – Exceptions for which unavailability is prerequisite**
- **805, 806 Special Rules**



RULE 801(c)

Definition of Hearsay

- **Hearsay is a**
- **Statement**
- **Other than one made by the Declarant while testifying at the trial or hearing**
- **Offered in evidence**
- **To Prove the truth of the Matter Asserted**

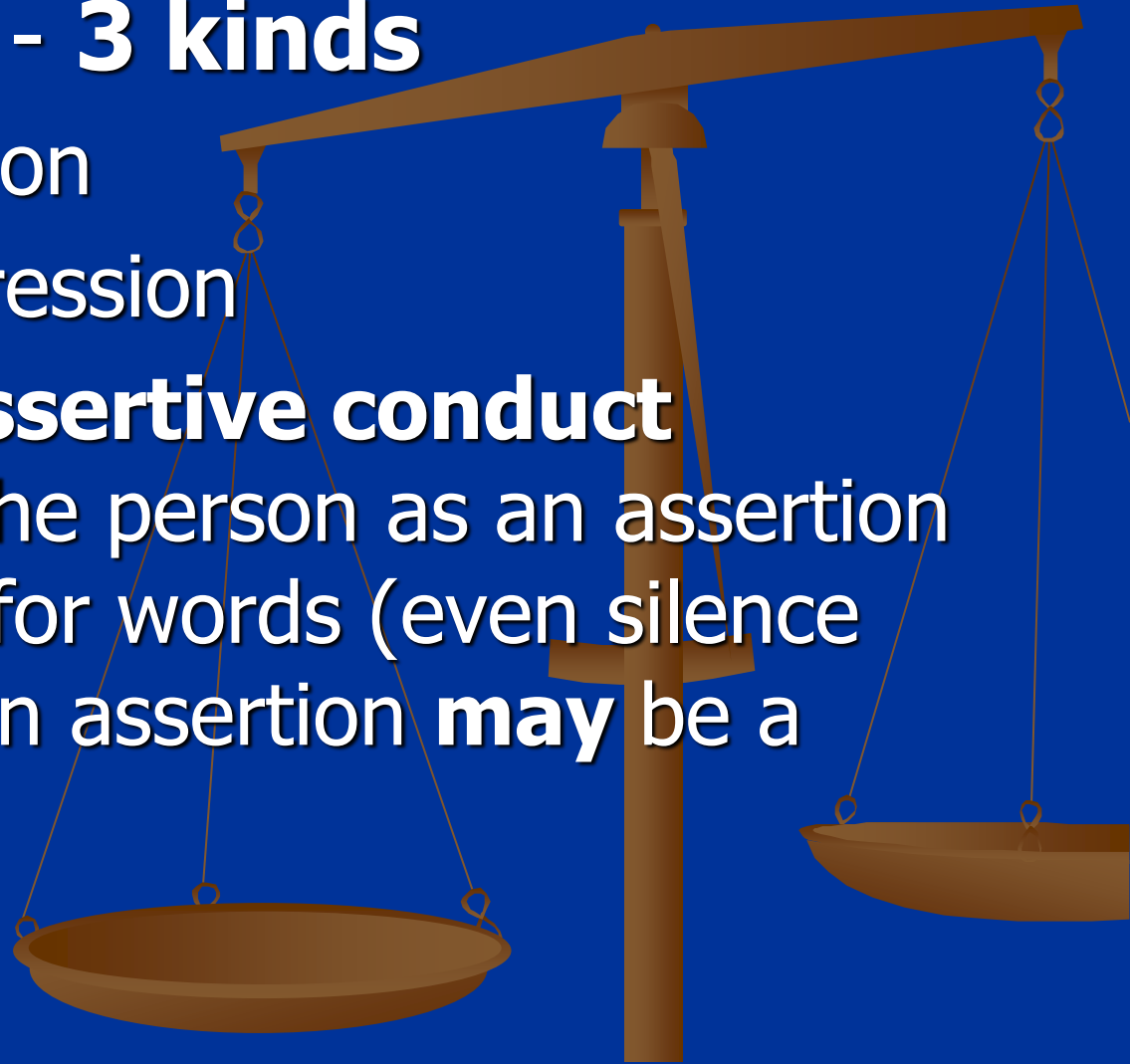


RULE 801(a)

Definition of Statement

■ STATEMENT - 3 kinds

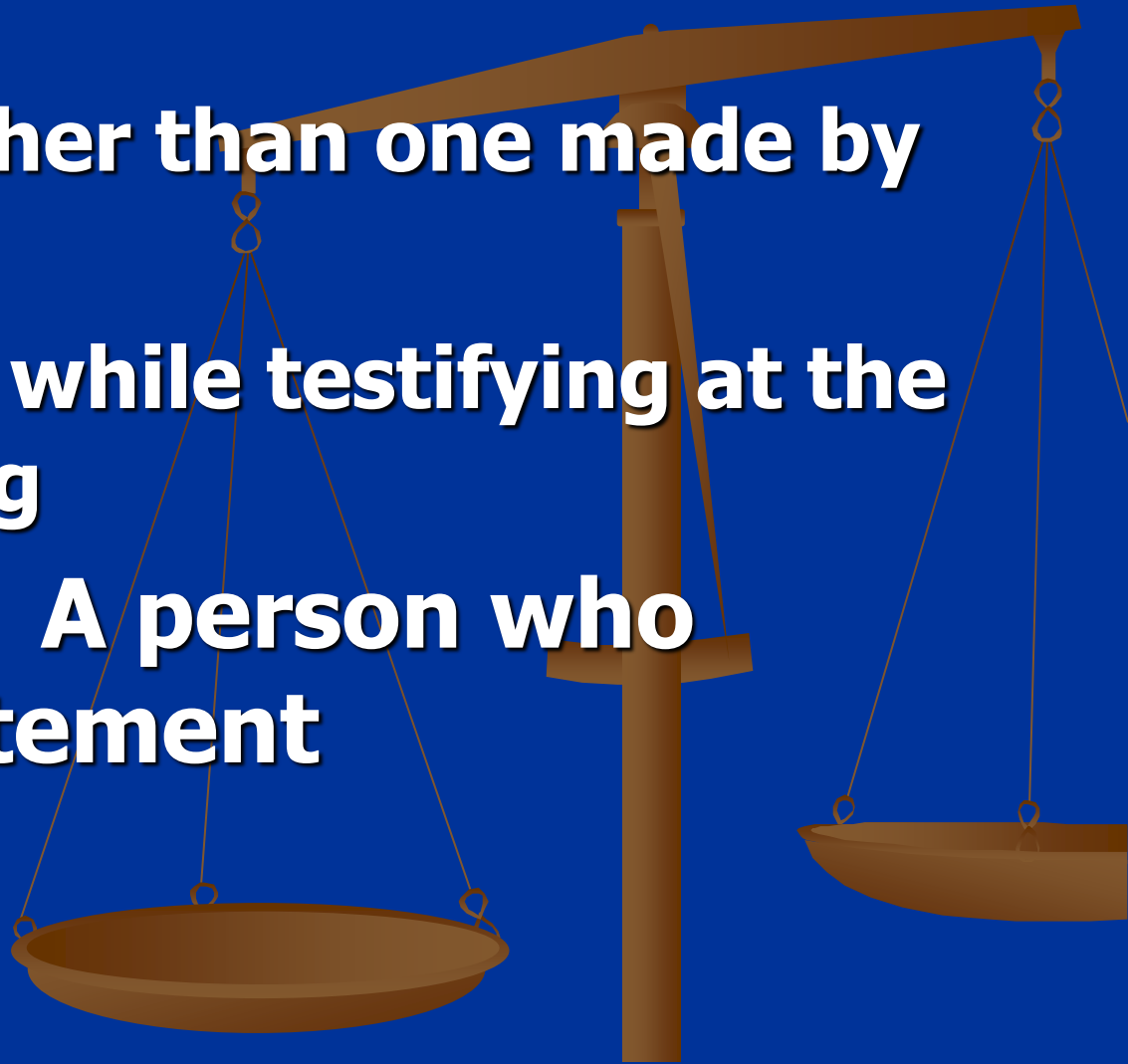
- Oral expression
- Written expression
- Nonverbal, **assertive conduct** intended by the person as an assertion or substitute for words (even silence intended as an assertion **may** be a statement)



RULE 801(b)

Definition of Hearsay

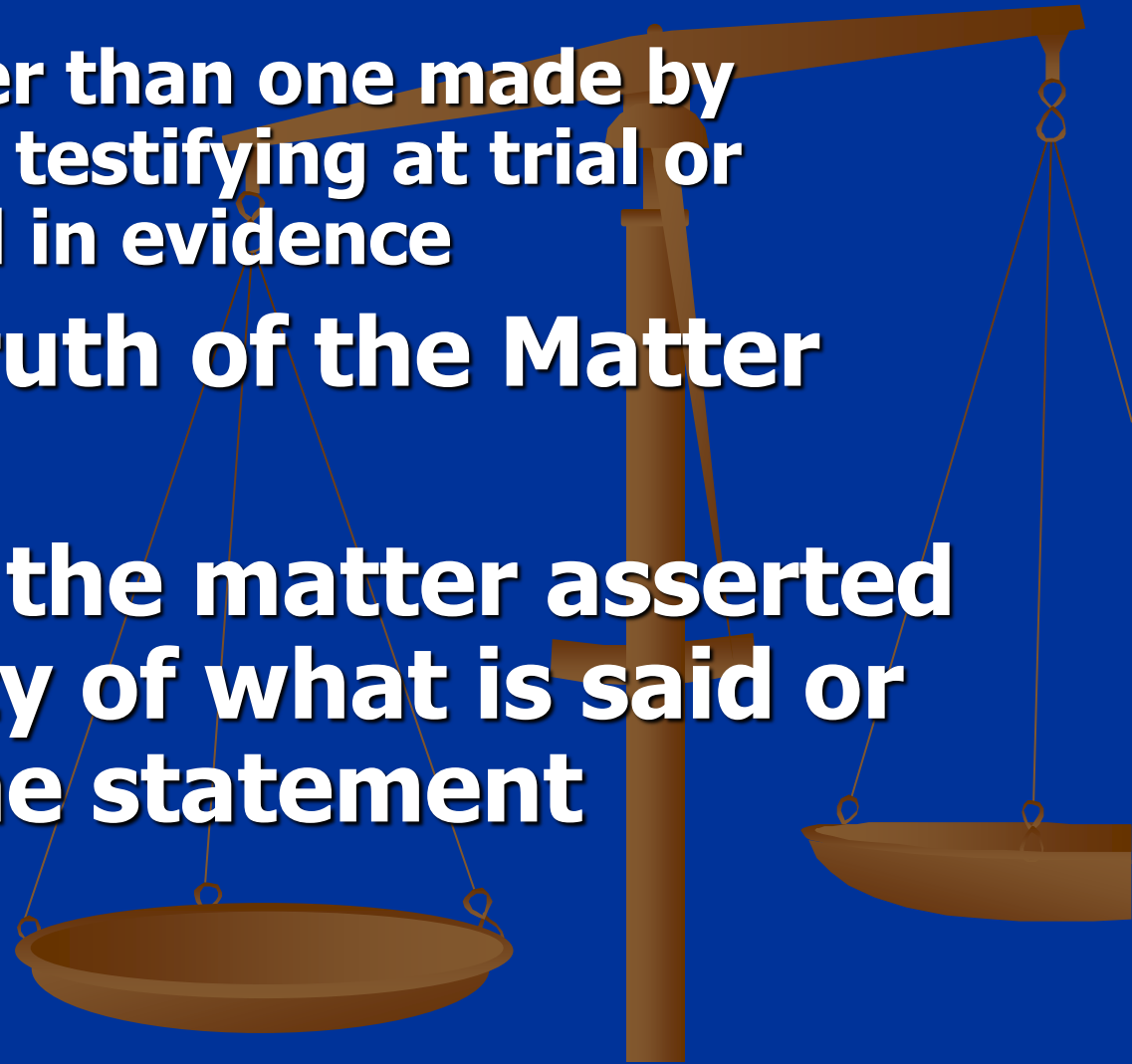
- Statement, other than one made by the
- **DECLARANT** while testifying at the trial or hearing
- Declarant is: **A person who makes a statement**



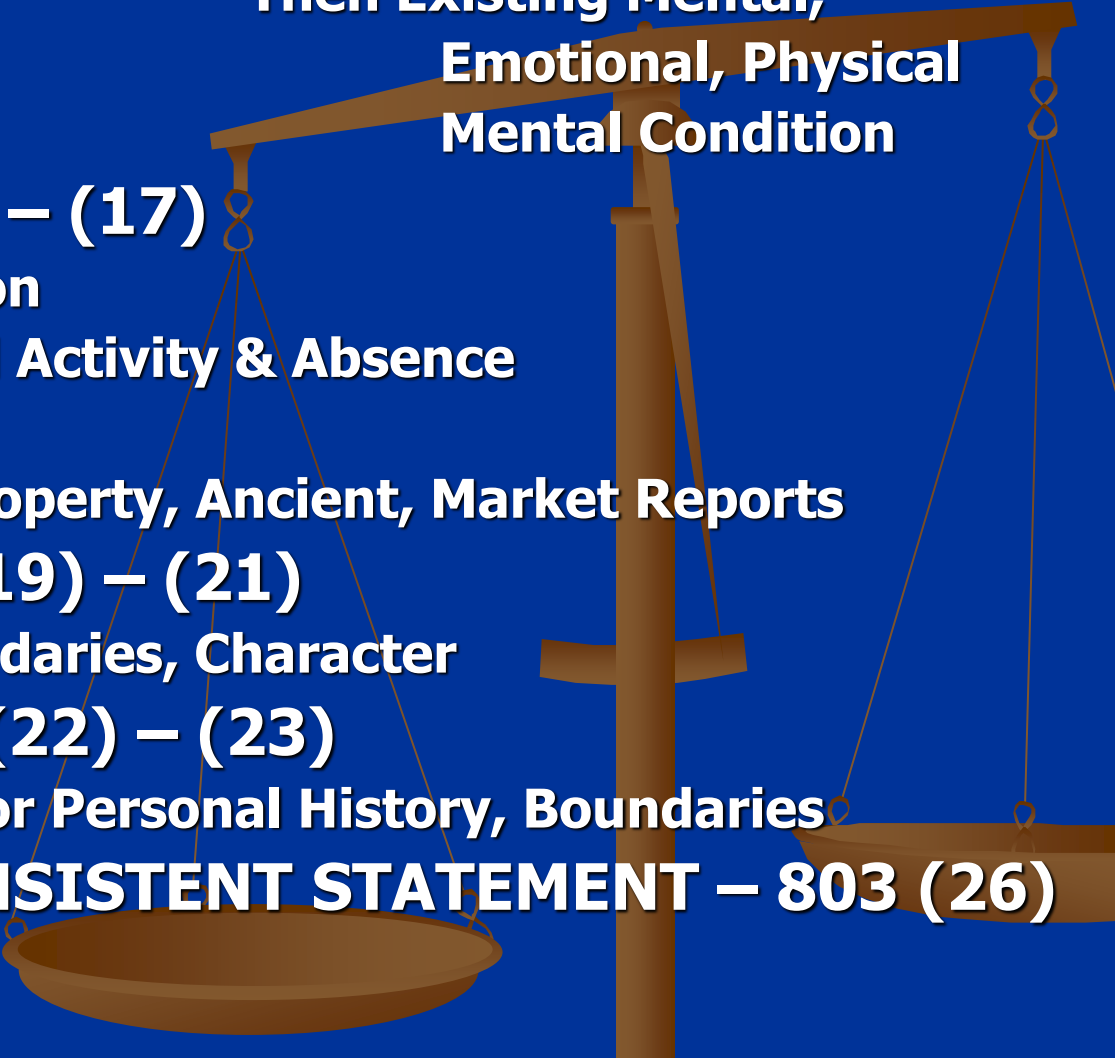
RULE 801

Definition of Hearsay

- **Statement, other than one made by Declarant while testifying at trial or hearing, offered in evidence**
- **To Prove the Truth of the Matter Asserted**
- **The truth of the matter asserted is the validity of what is said or written in the statement**



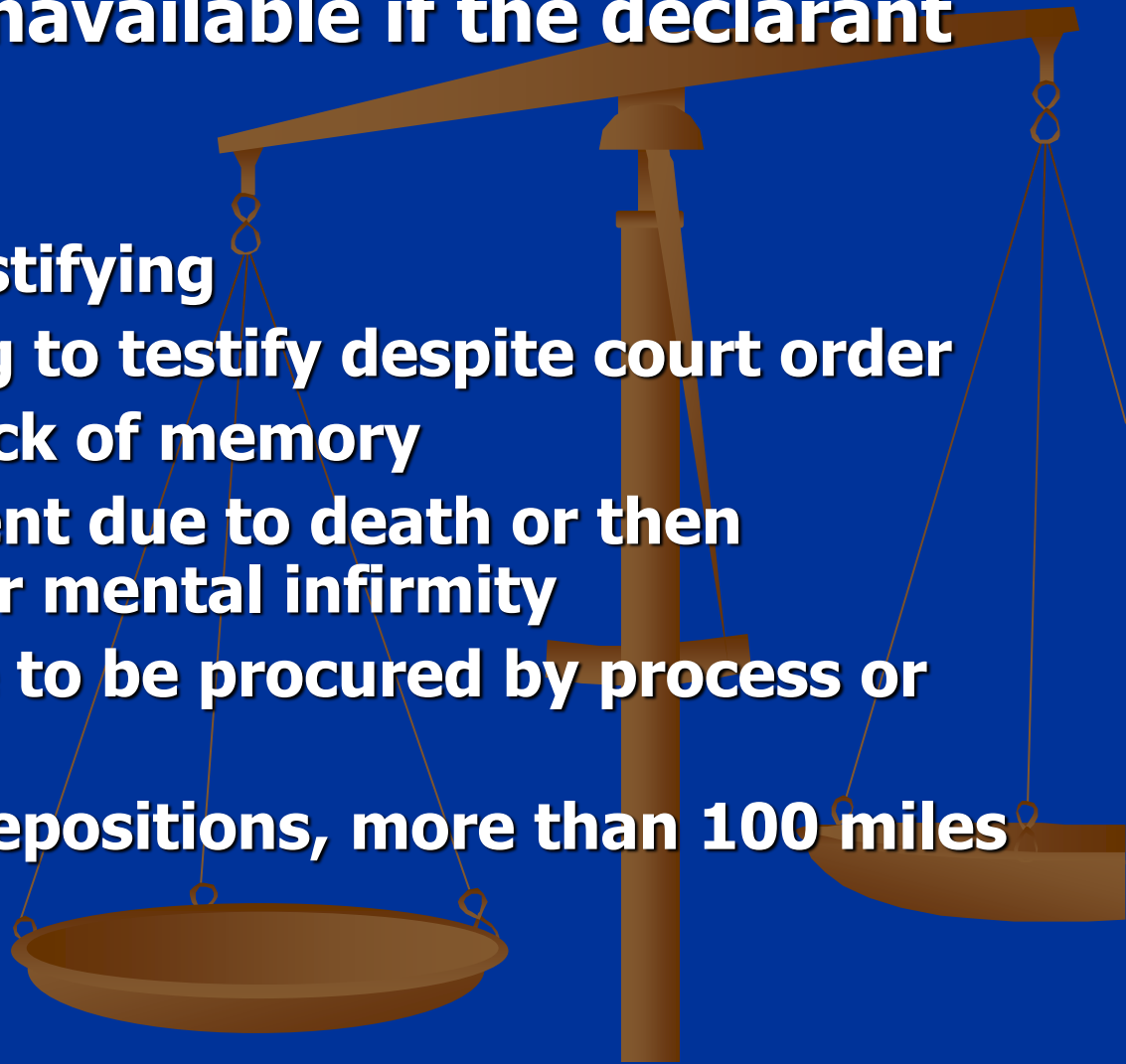
RULE 803 Exceptions

- **TRUTH PRODUCING – 803 (1) – (4)**
 - Identification
 - Admission
 - Medical Diagnosis & Treatment
 - Excited Utterance
 - Then Existing Mental, Emotional, Physical Mental Condition
 - **RECORDS – 803 (5) – (17)**
 - Recorded Recollection
 - Regularly Conducted Activity & Absence
 - Public & Absence
 - Statistics, Family, Property, Ancient, Market Reports
 - **REPUTATION 803 (19) – (21)**
 - Family History, Boundaries, Character
 - **JUDGMENTS – 803 (22) – (23)**
 - Convictions, Family or Personal History, Boundaries
 - **Some PRIOR INCONSISTENT STATEMENT – 803 (26)**
- 

RULE 804

Unavailability

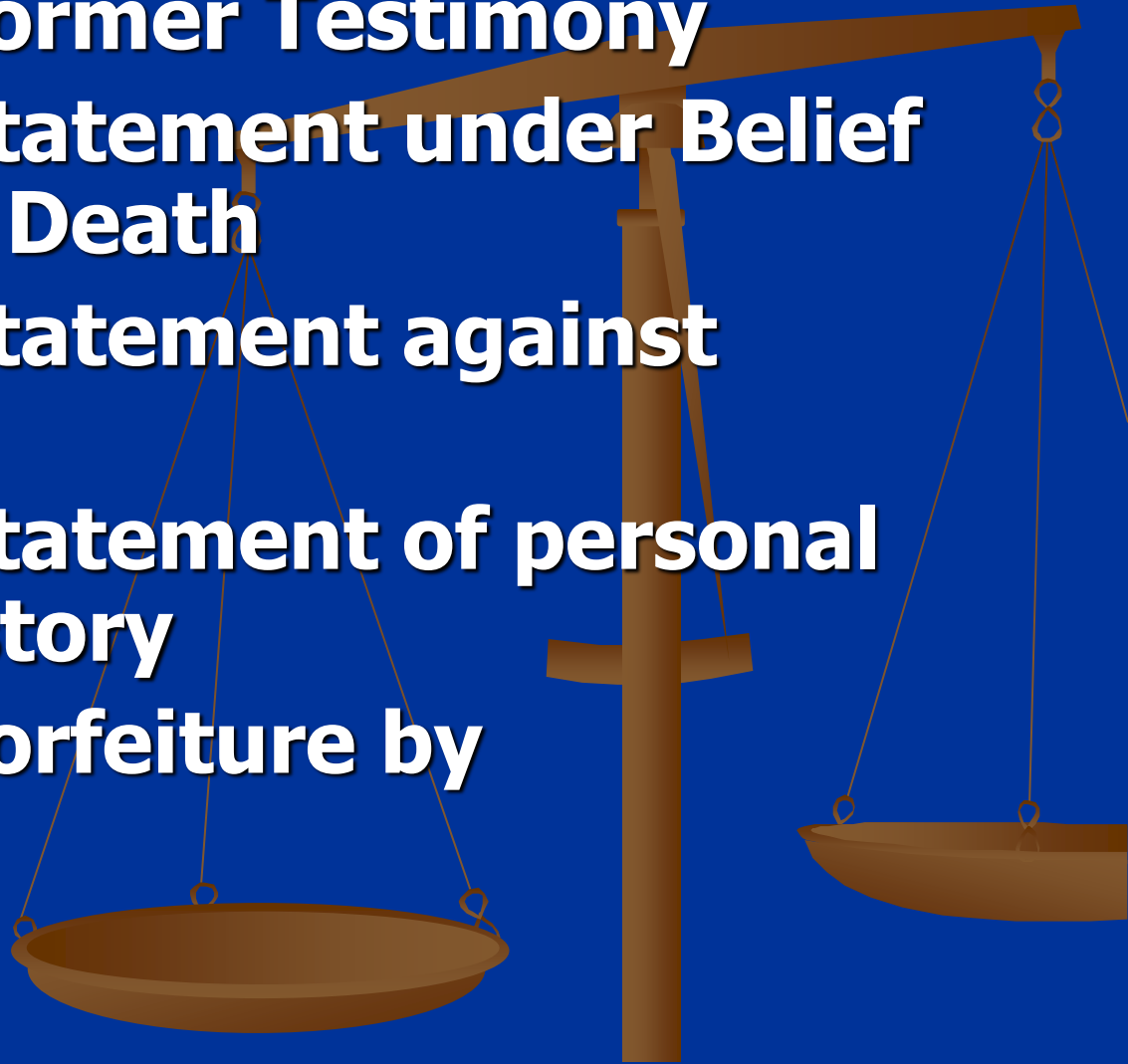
- **A declarant is unavailable if the declarant (is)**
 - **Exempted from testifying**
 - **Persists in refusing to testify despite court order**
 - **Demonstrates a lack of memory**
 - **Unable to be present due to death or then existing physical or mental infirmity**
 - **Absent and unable to be procured by process or reasonable means**
 - **In civil cases for depositions, more than 100 miles**



RULE 804

Exceptions

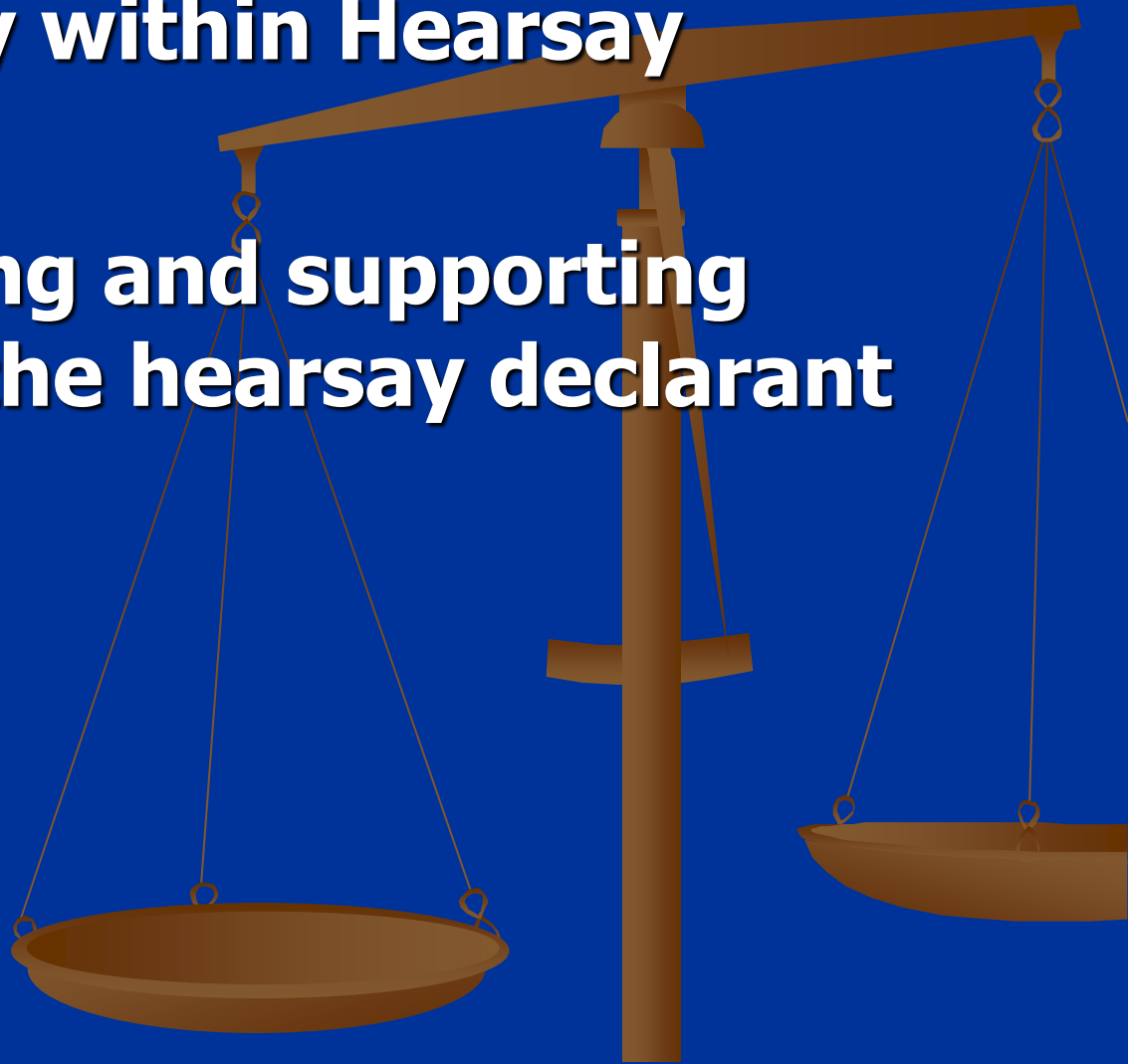
- **804(b)(1) – Former Testimony**
- **804(b)(2) – Statement under Belief of Impending Death**
- **804(b)(3) – Statement against Interest**
- **804(b)(4) – Statement of personal and family history**
- **804(b)(6) – Forfeiture by Wrongdoing**



RULE 805 & 806

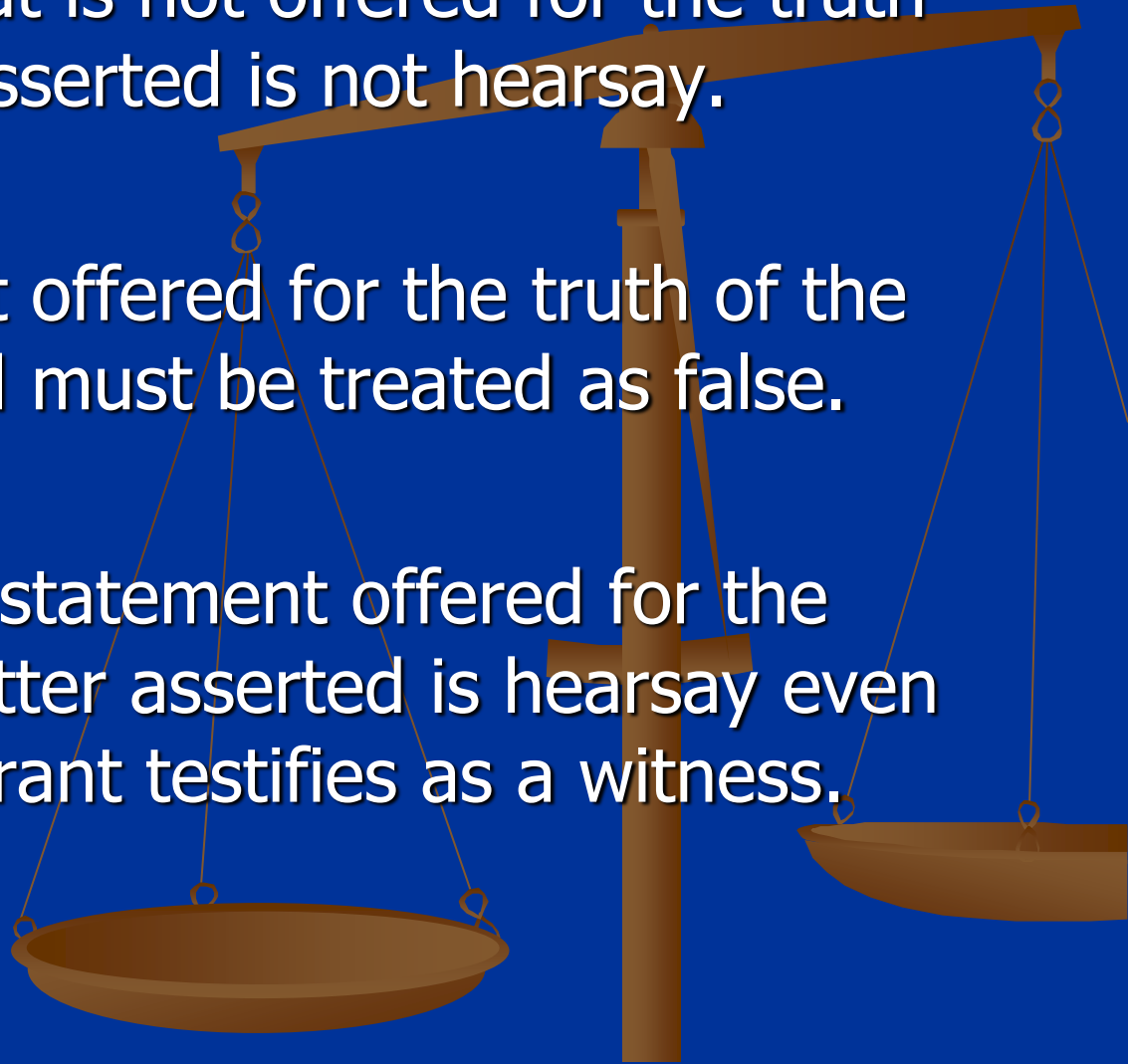
Special Hearsay Rules

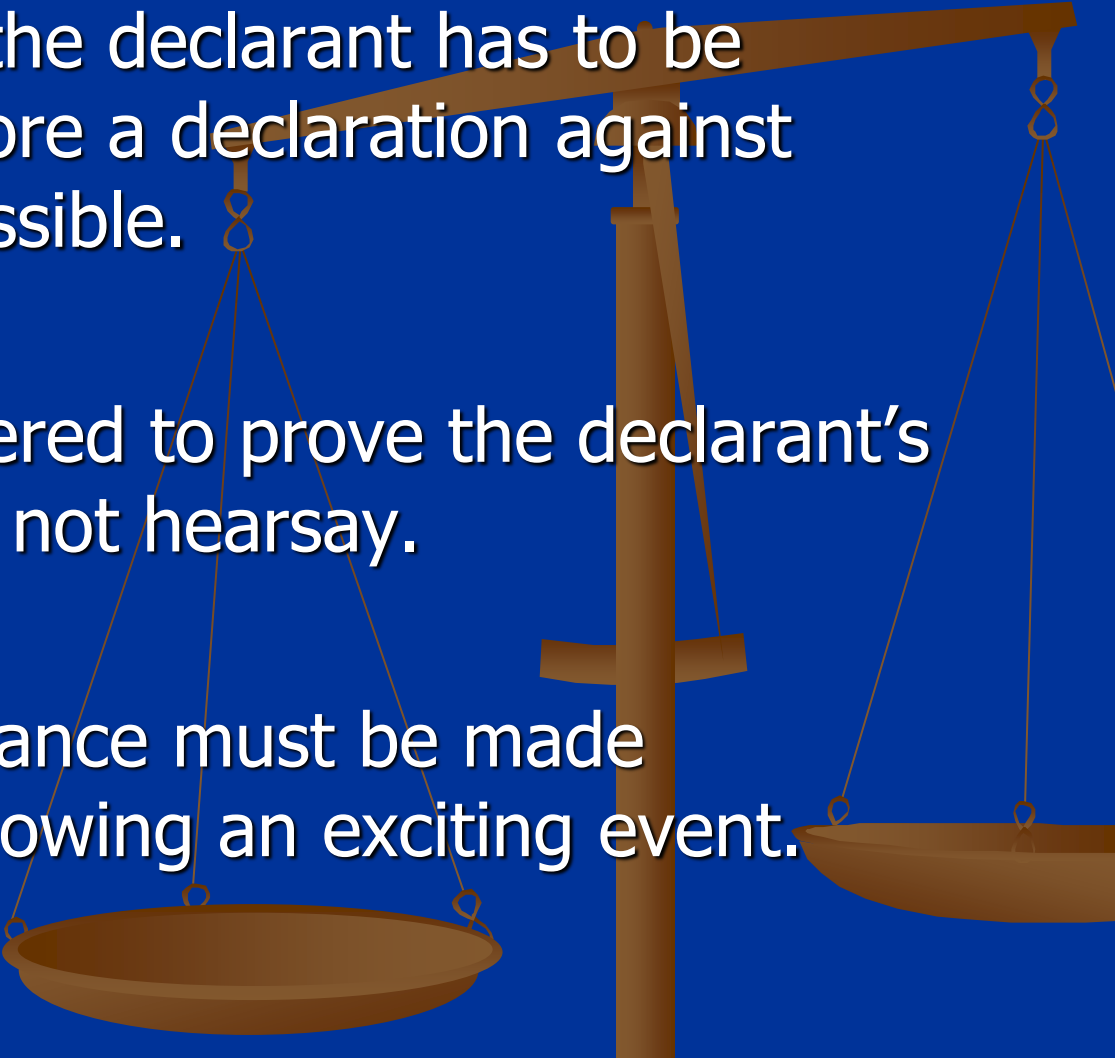
- **805 – Hearsay within Hearsay**
- **806 – Attacking and supporting credibility of the hearsay declarant**



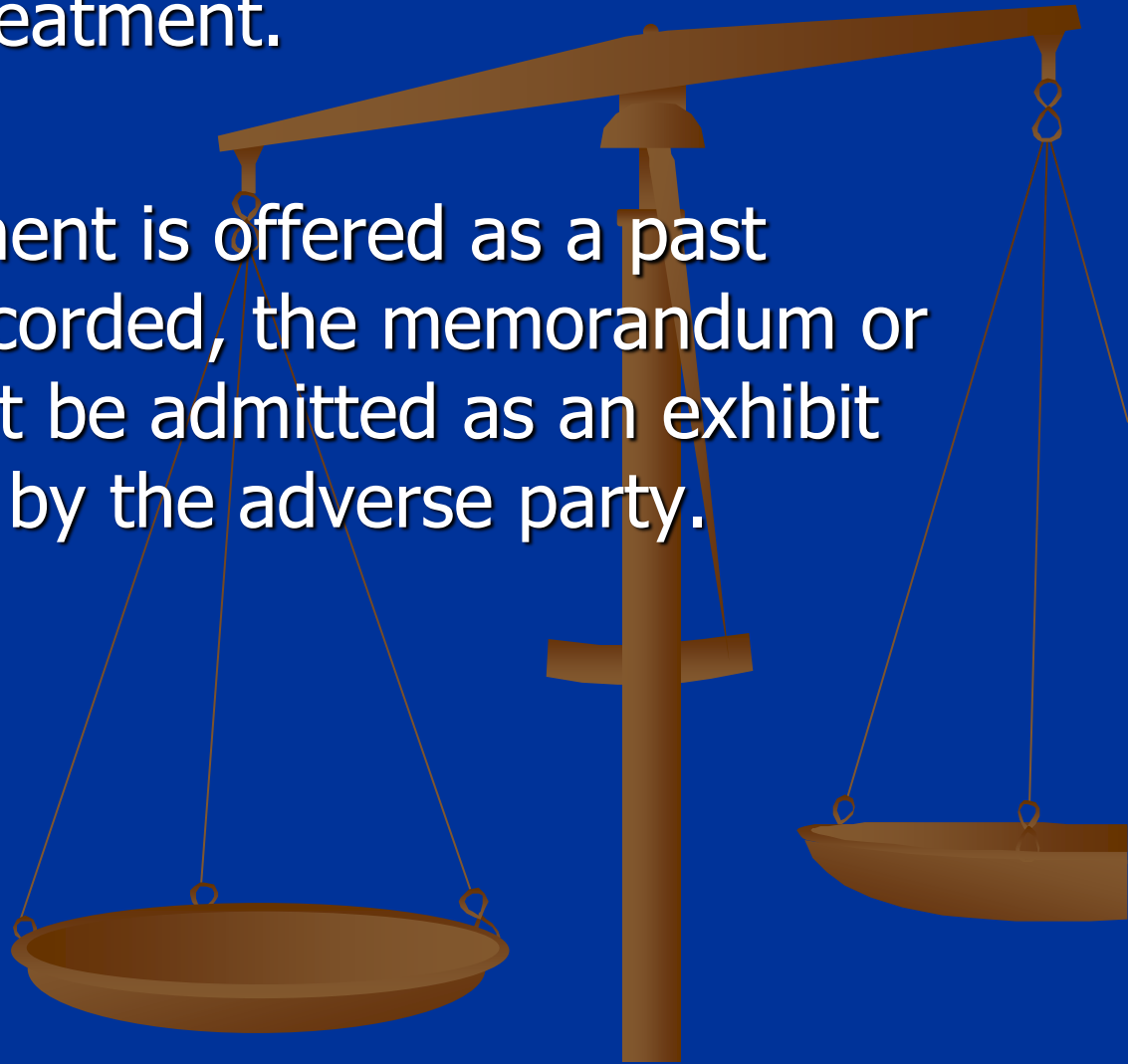
Test Your Hearsay IQ: True or False

- 1. A statement that is not offered for the truth of the matter asserted is not hearsay.
- 2. A statement not offered for the truth of the matter asserted must be treated as false.
- 3. An out of court statement offered for the truth of the matter asserted is hearsay even when the declarant testifies as a witness.

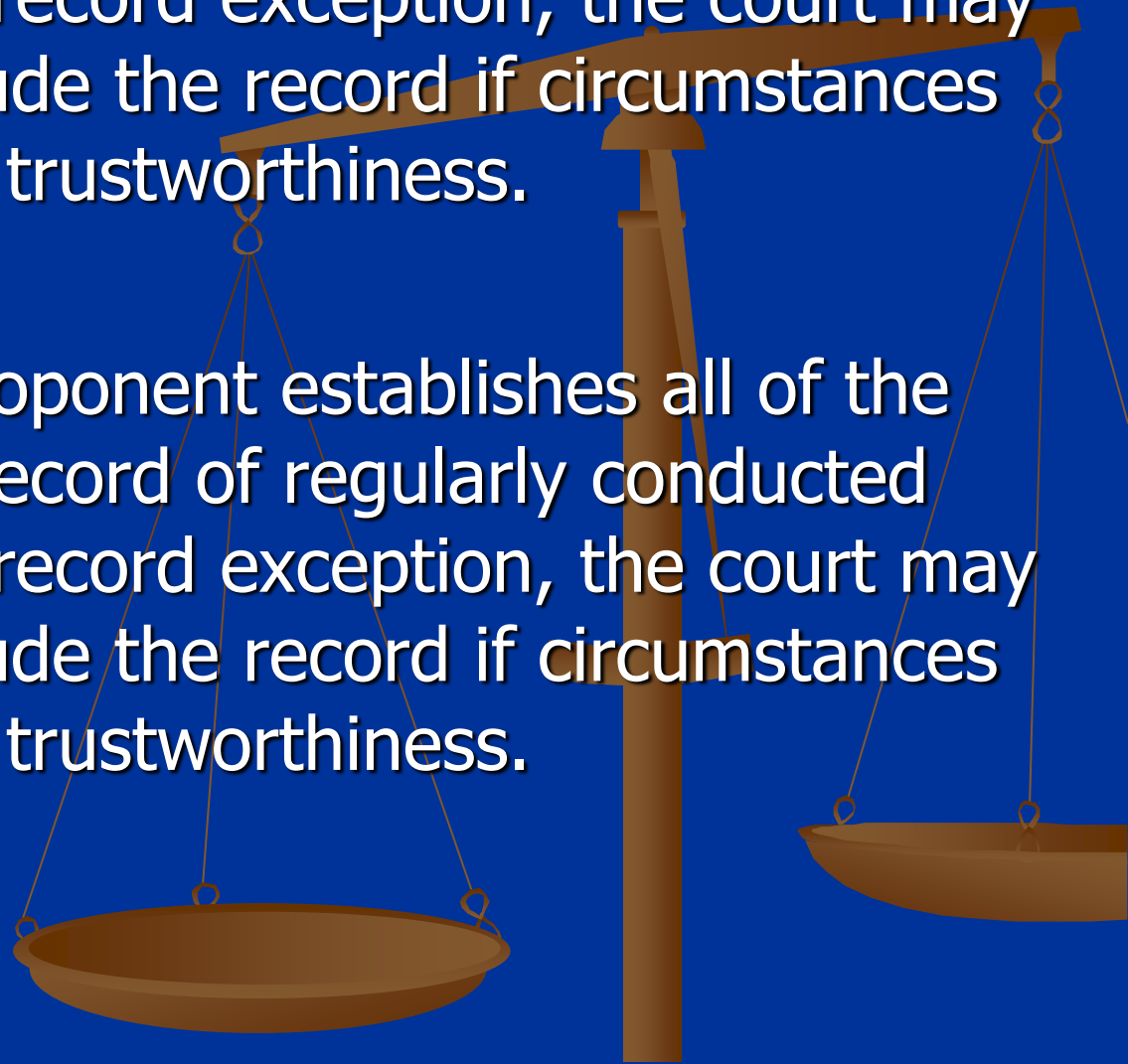


- 
- 4. The only difference between a statement of a party opponent and a declaration against interest is that the declarant has to be unavailable before a declaration against interest is admissible.
 - 5. A statement offered to prove the declarant's state of mind is not hearsay.
 - 6. An excited utterance must be made immediately following an exciting event.

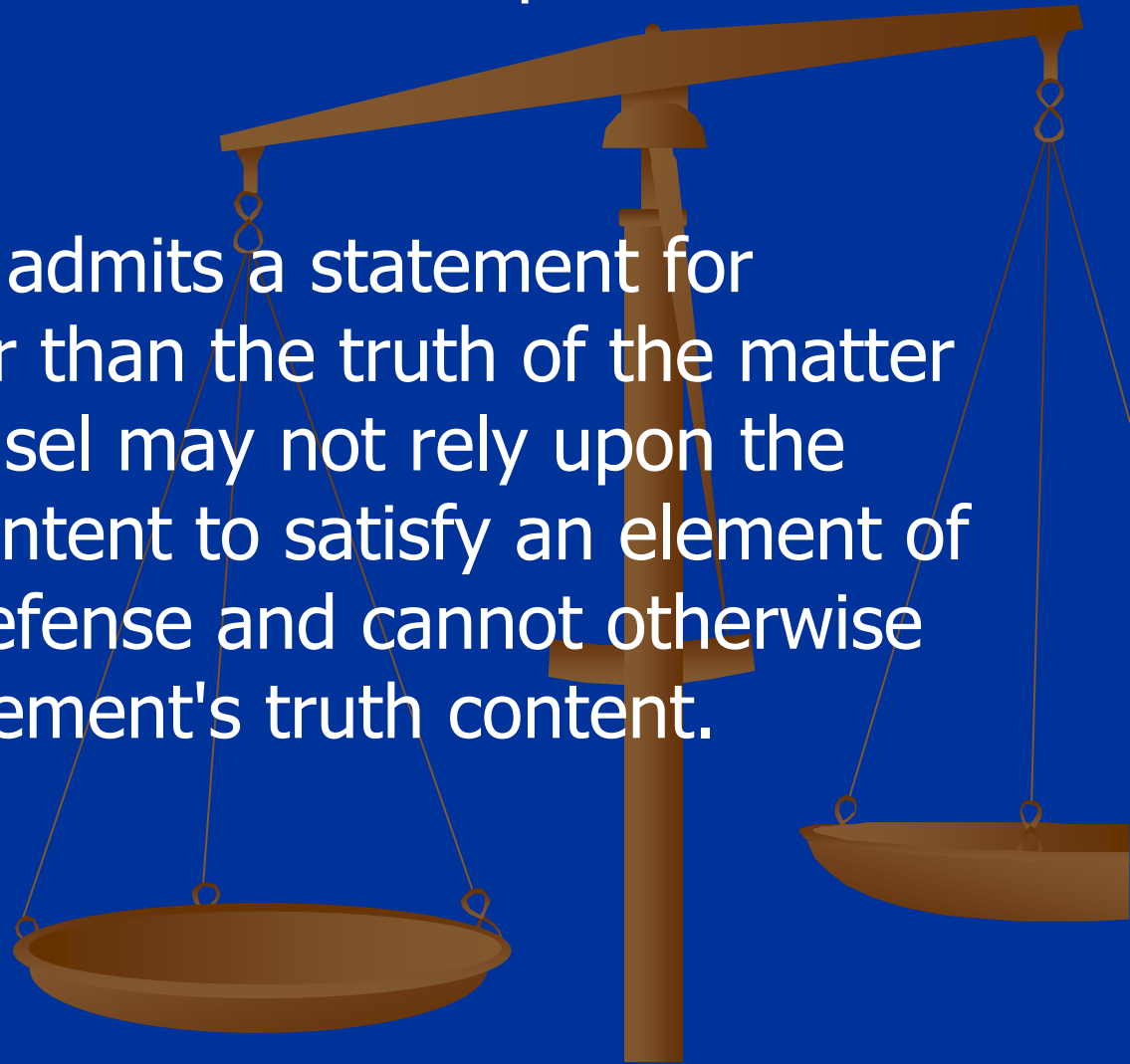
- 7. A statement offered under the medical diagnosis and treatment exception may be made either for the purpose of medical diagnosis or treatment.
- 8. When a statement is offered as a past recollection recorded, the memorandum or record may not be admitted as an exhibit unless offered by the adverse party.



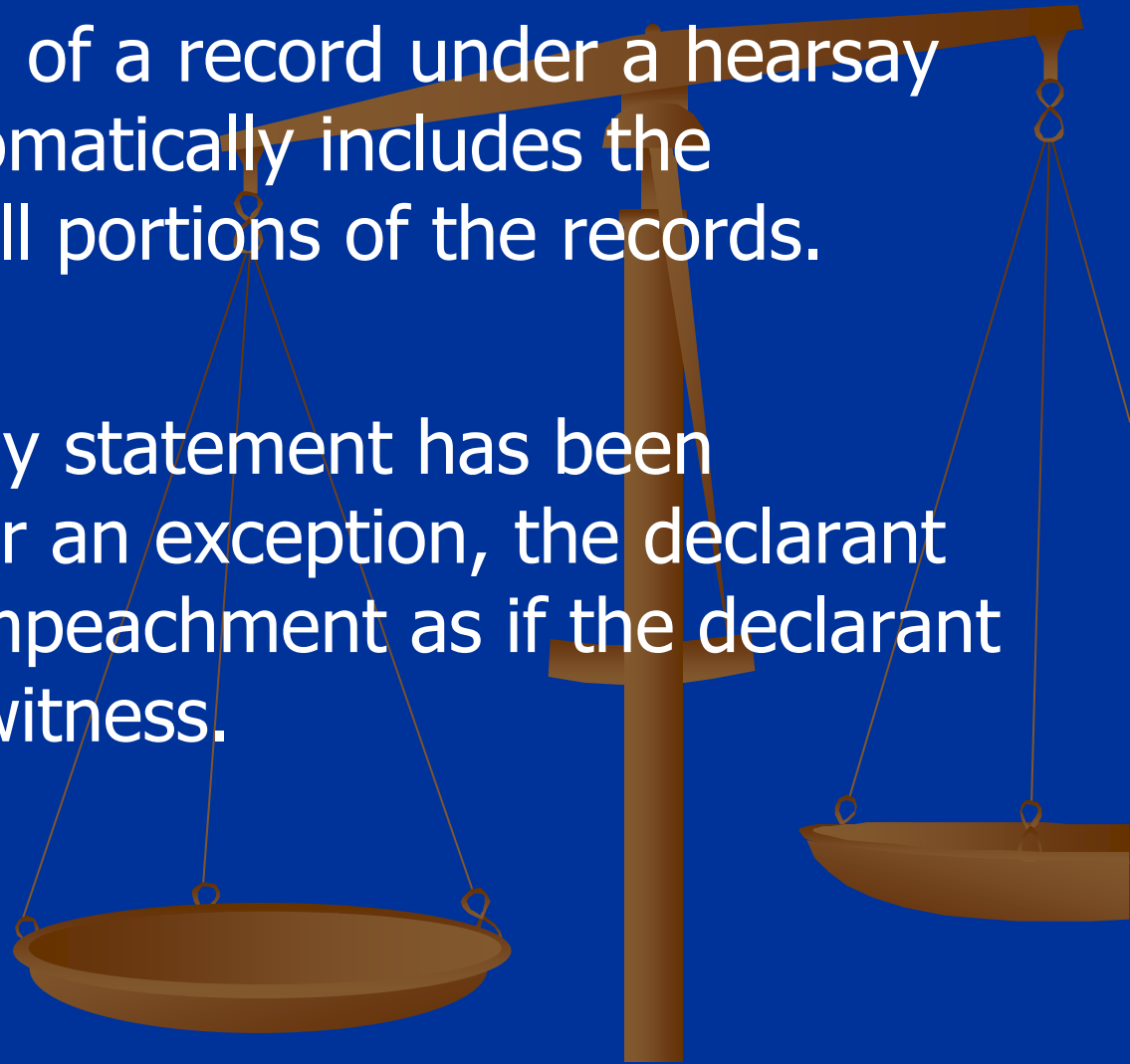
- 9. Even when a proponent establishes all of the elements of the record of regularly conducted activity or public record exception, the court may nonetheless exclude the record if circumstances indicate a lack of trustworthiness.
- 10. Even when a proponent establishes all of the elements of the record of regularly conducted activity or public record exception, the court may nonetheless exclude the record if circumstances indicate a lack of trustworthiness.



- 11. When relying on a Rule 804 hearsay exception, counsel must offer proof of unavailability.
- 12. When counsel admits a statement for purposes other than the truth of the matter asserted, counsel may not rely upon the statement's content to satisfy an element of the claim or defense and cannot otherwise argue the statement's truth content.

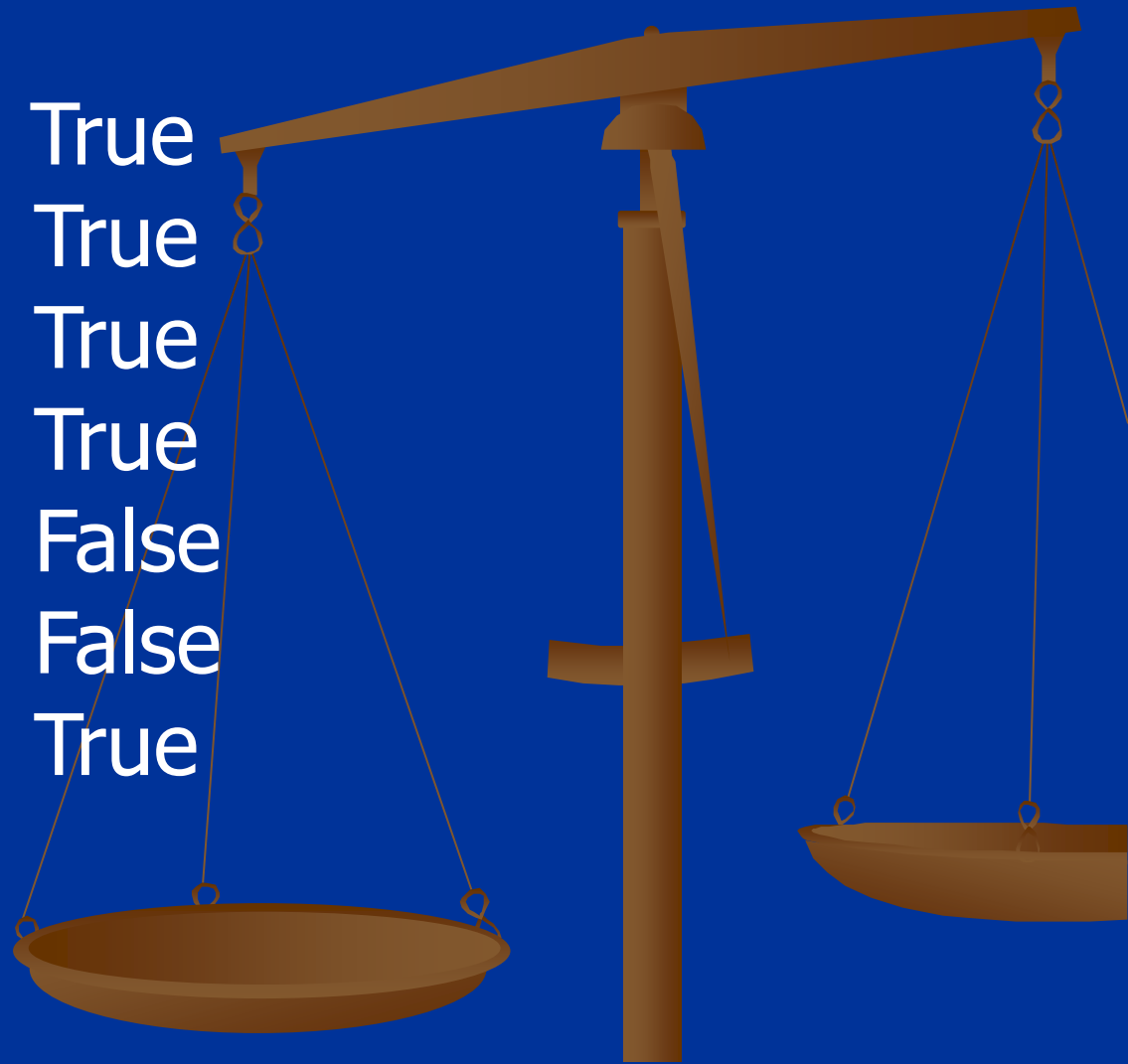


- 13. All hearsay exceptions are included in Rules 803 and 804.
- 14. The admission of a record under a hearsay exception automatically includes the admission of all portions of the records.
- 15. Once a hearsay statement has been admitted under an exception, the declarant is subject to impeachment as if the declarant testified as a witness.

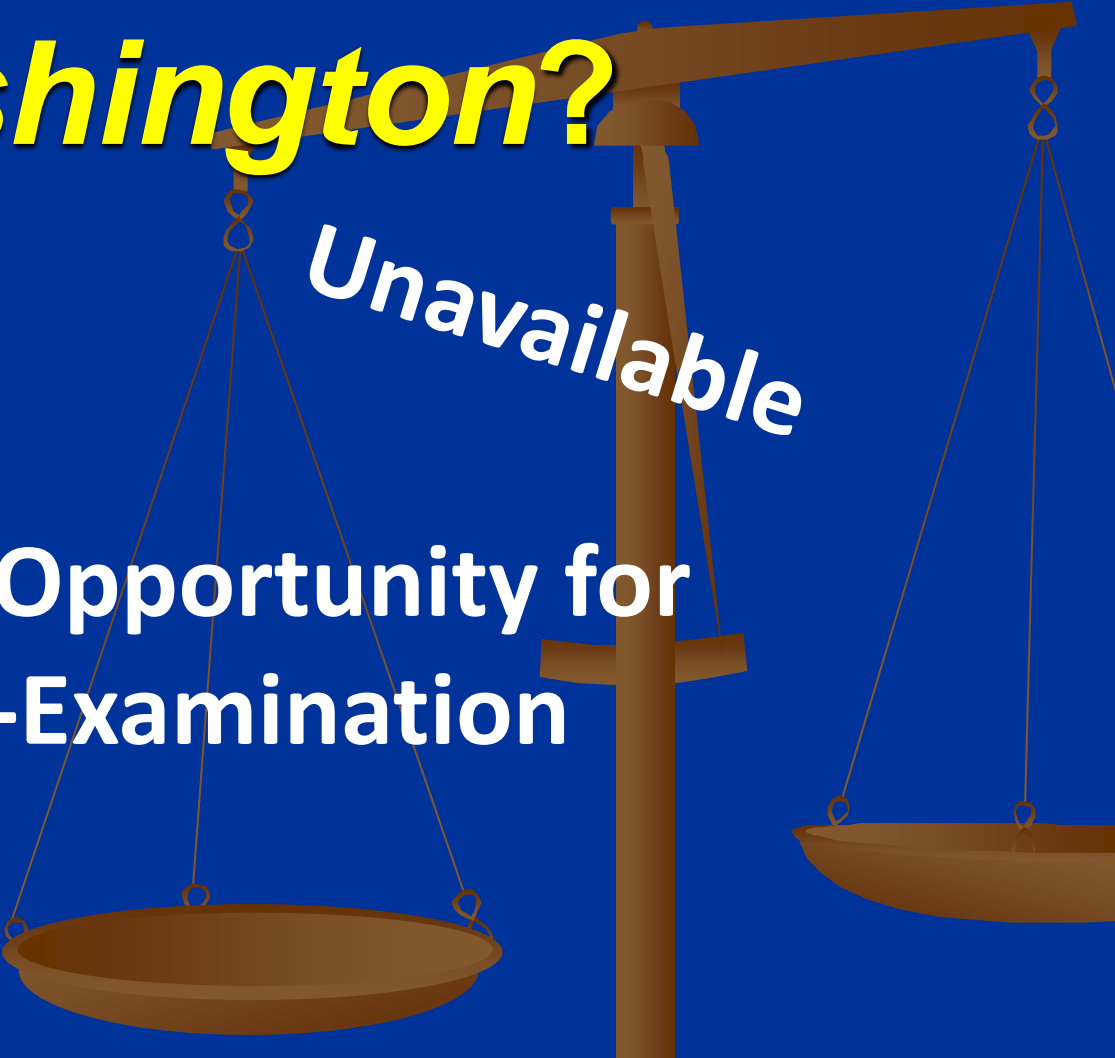


Exam Key

- | | | | |
|----|-------|-----|-------|
| 1. | True | 9. | True |
| 2. | False | 10. | True |
| 3. | True | 11. | True |
| 4. | False | 12. | True |
| 5. | True | 13. | False |
| 6. | False | 14. | False |
| 7. | False | 15. | True |
| 8. | True | | |



What is the rule of *Crawford v. Washington?*



Testimonial
Statements

Unavailable

Prior Opportunity for
Cross-Examination

Testimonial Statements

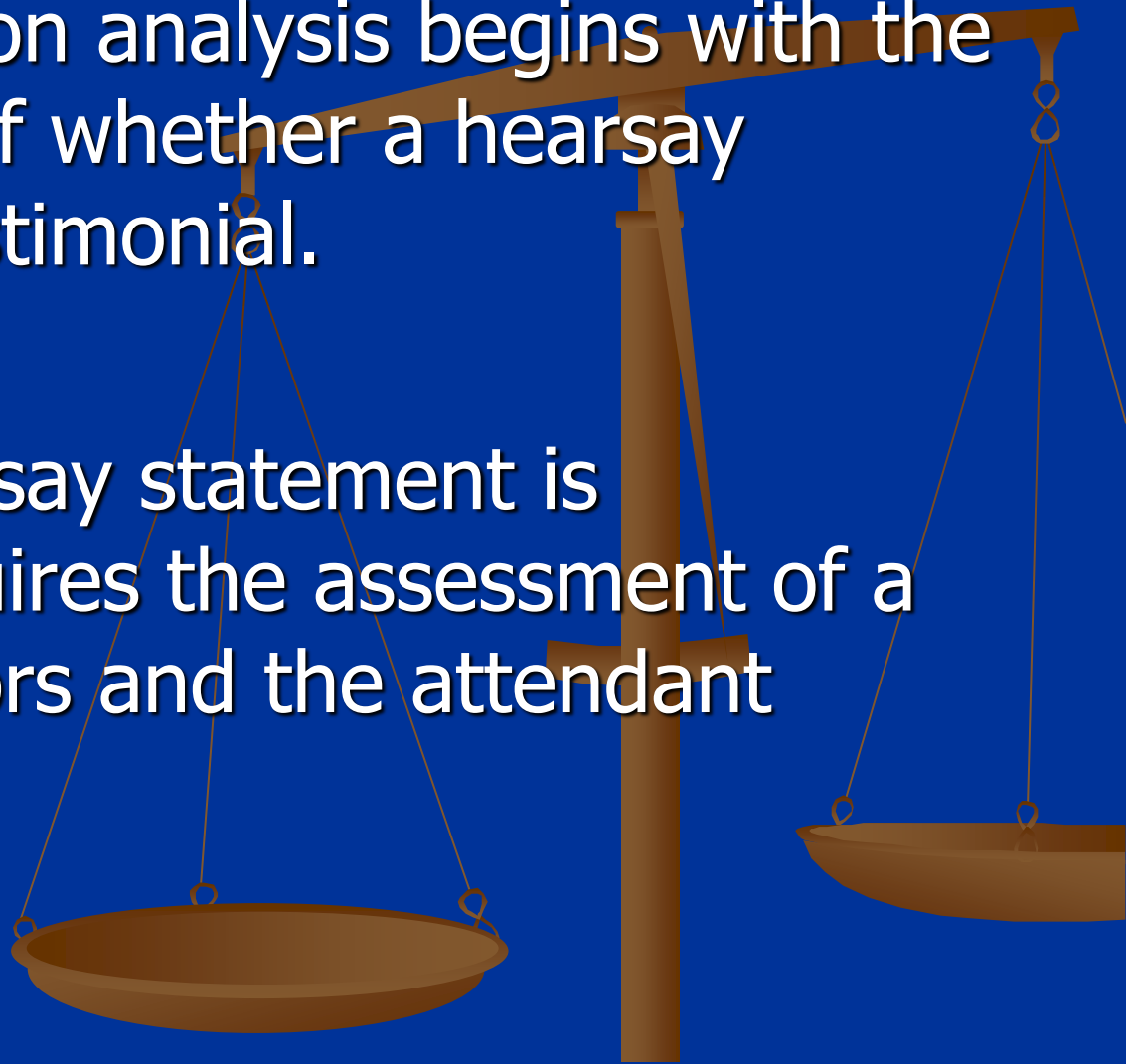


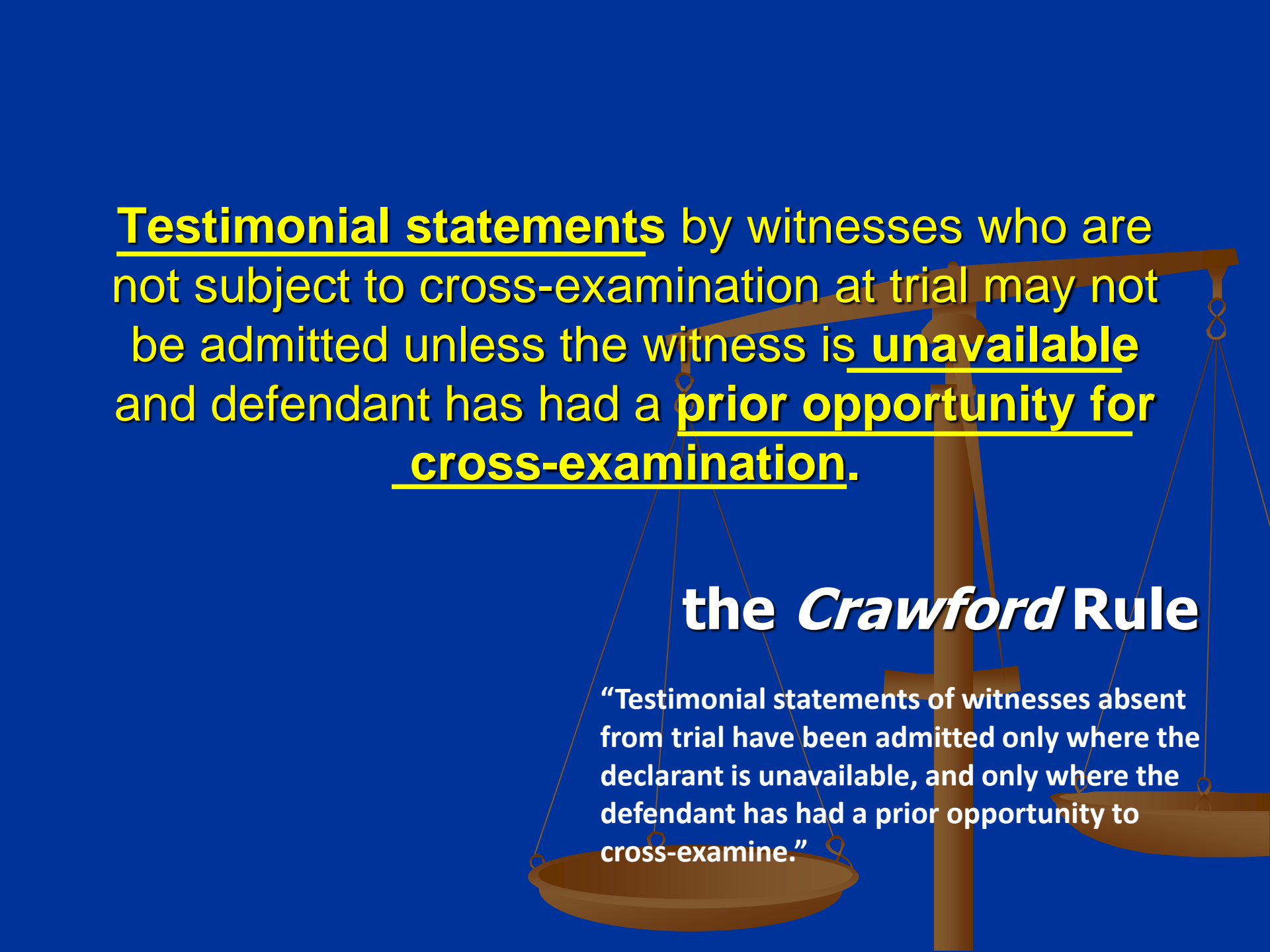
Unavailable

Prior Opportunity for
Cross-Examination

Practice Pointer

- The confrontation analysis begins with the determination of whether a hearsay statement is testimonial.
- Whether a hearsay statement is testimonial requires the assessment of a number of factors and the attendant circumstances.





Testimonial statements by witnesses who are not subject to cross-examination at trial may not be admitted unless the witness is **unavailable** and defendant has had a **prior opportunity for cross-examination.**

the *Crawford* Rule

“Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”

Crawford Flowchart



Is hearsay evidence offered against defendant at trial? **

▼ YES ▼

Is declarant subject to cross-examination at trial?

▼ NO ▼

Is the evidence testimonial?

▼ YES ▼

Has the State established unavailability?

▼ NO ▼

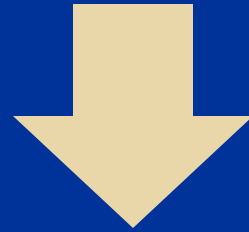
Has the State ALSO established a prior opportunity to cross-examine?

▼ NO ▼

Has the defendant waived the right to confrontation?

▼ NO ▼

Crawford Flowchart



**Confrontation clause prohibits
admissibility.**

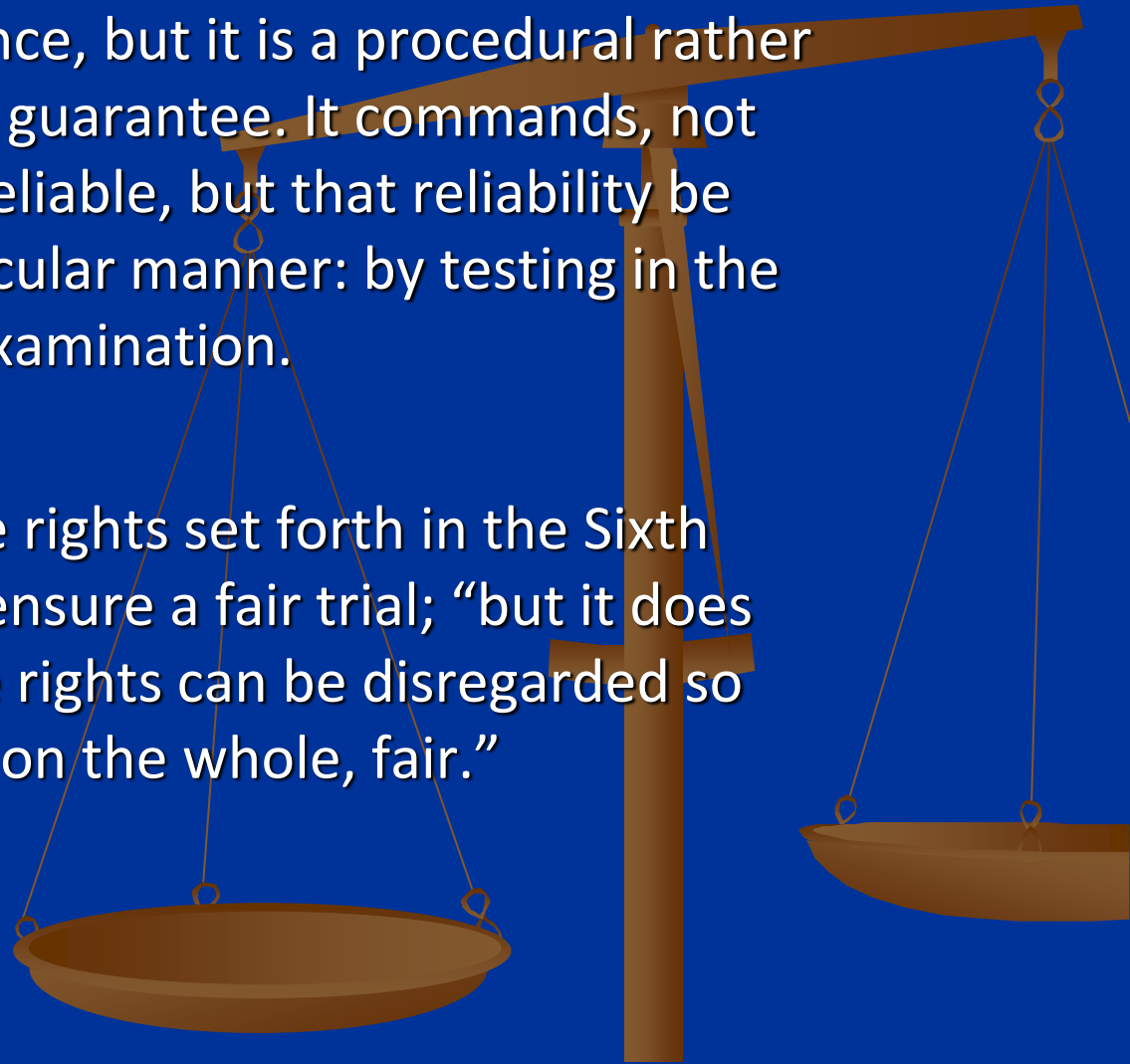
▼ **Otherwise** ▼

**No confrontation issue.
Other rules of evidence
determine admissibility.**



Confrontation Clause: Underlying Philosophy:

- To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.
- The purpose of the rights set forth in the Sixth Amendment is to ensure a fair trial; “but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.”



Confrontation Clause: Application



The constitutional text and history “reflects an especially acute concern with a specific type of out-of-court statement.”

“those who bear testimony against the accused”

“An accuser who makes a formal statement to a government officer bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”

“testimony is a declaration or affirmation made to establish or prove some fact”

Core class of testimonial statements

→ Ex parte in-court testimony or functional equivalent

Affidavits, Depositions, Plea Allocutions ←

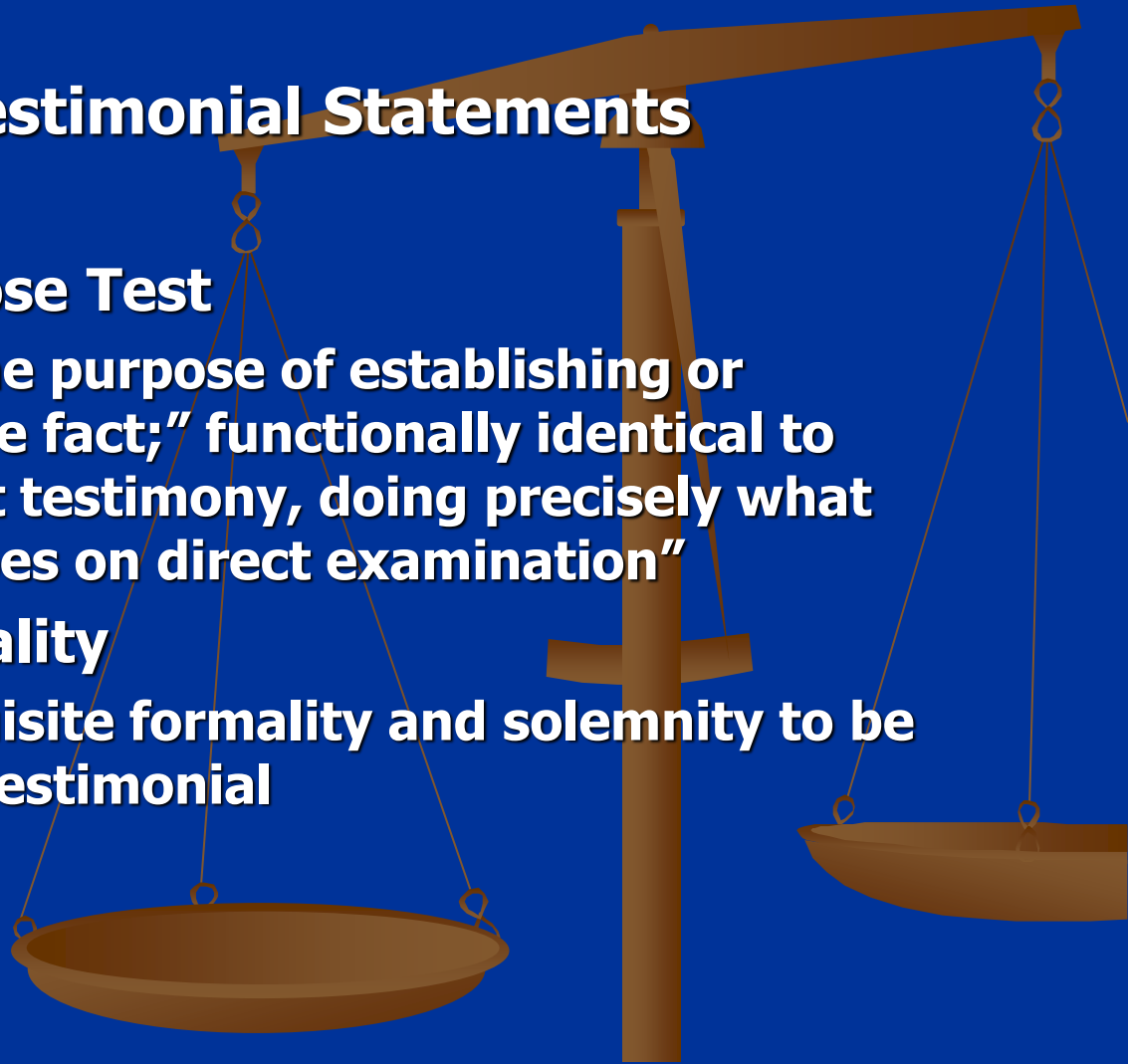
→ Extrajudicial statements in formalized testimonial materials, including interrogations and custodial examinations

Prior trial, hearing, grand jury testimony ←

→ Statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available at a later trial

Testimonial Statements

- **Core Class of Testimonial Statements**
 - **Primary Purpose Test**
 - “made for the purpose of establishing or proving some fact;” functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination”
 - **Level of Formality**
 - contain requisite formality and solemnity to be considered testimonial



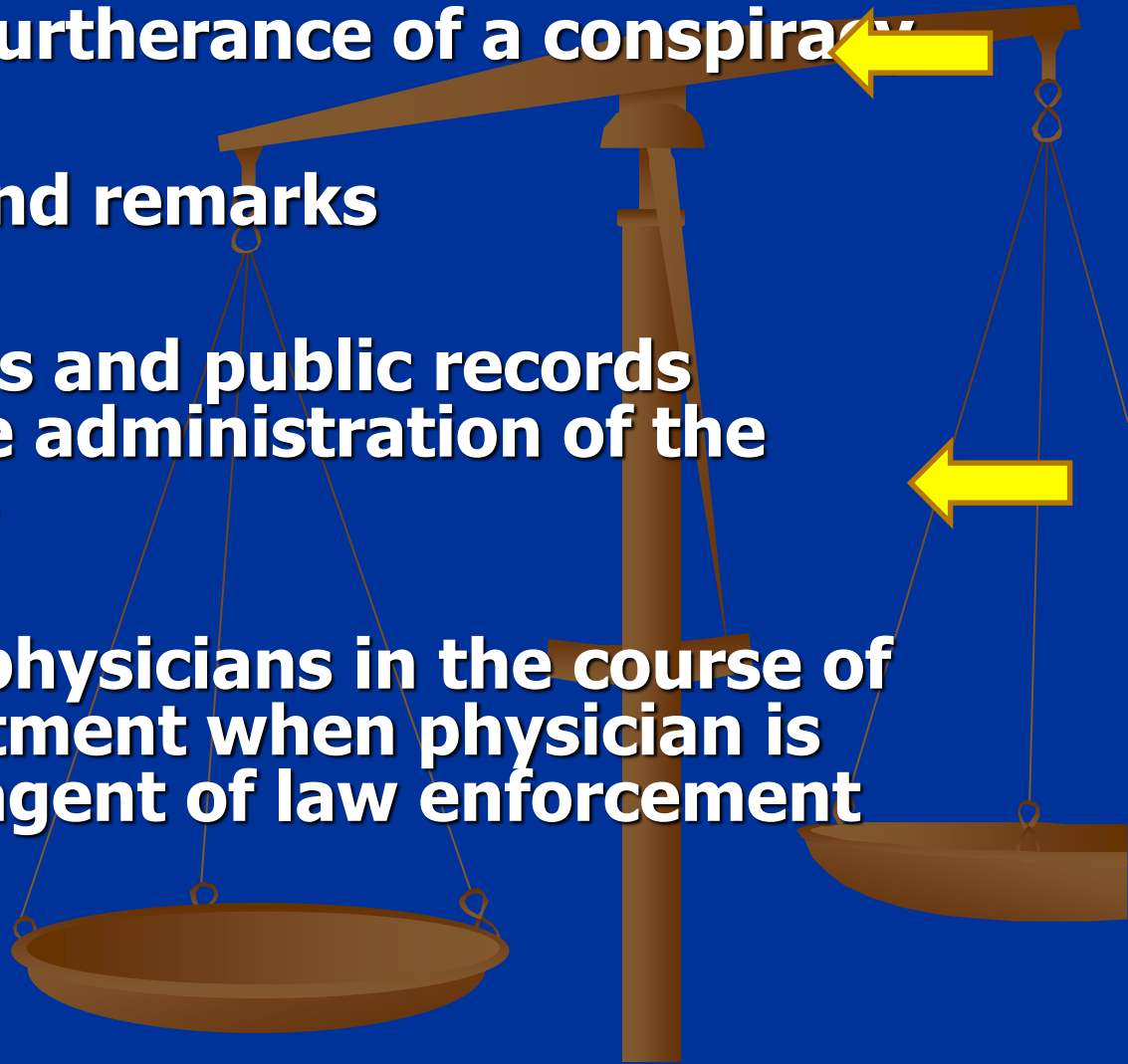
Non-Testimonial Statements

Statements in furtherance of a conspiracy

Casual or offhand remarks

Certain business and public records created for the administration of the entity's affairs

Statements to physicians in the course of receiving treatment when physician is not acting as agent of law enforcement



Testimonial Statements

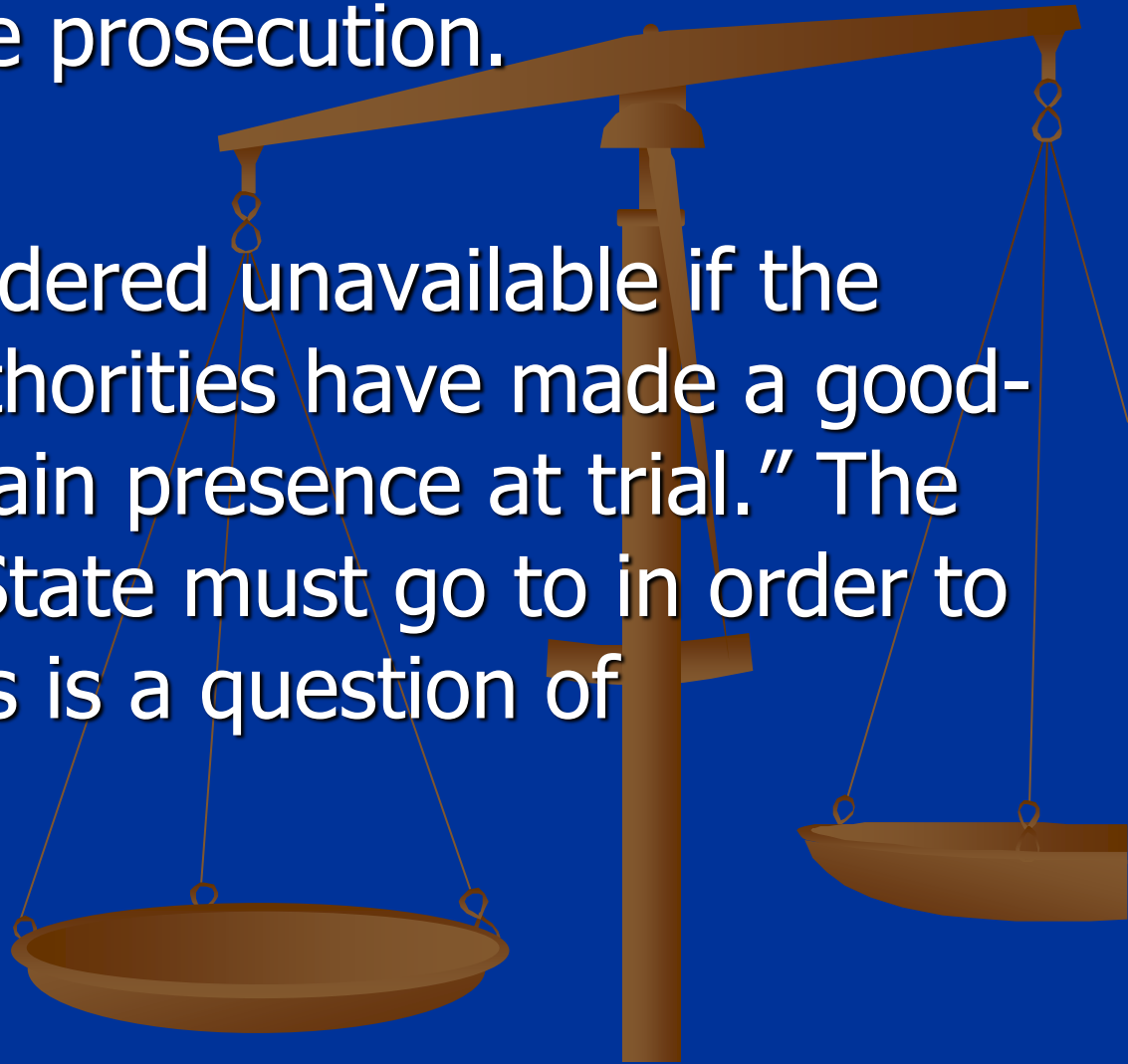


Unavailable

Prior Opportunity for
Cross-Examination

Practice Pointer

- Unavailability is an issue of fact that must be established by the prosecution.
- A witness is considered unavailable if the “prosecutorial authorities have made a good-faith effort to obtain presence at trial.” The lengths that the State must go to in order to produce a witness is a question of reasonableness.

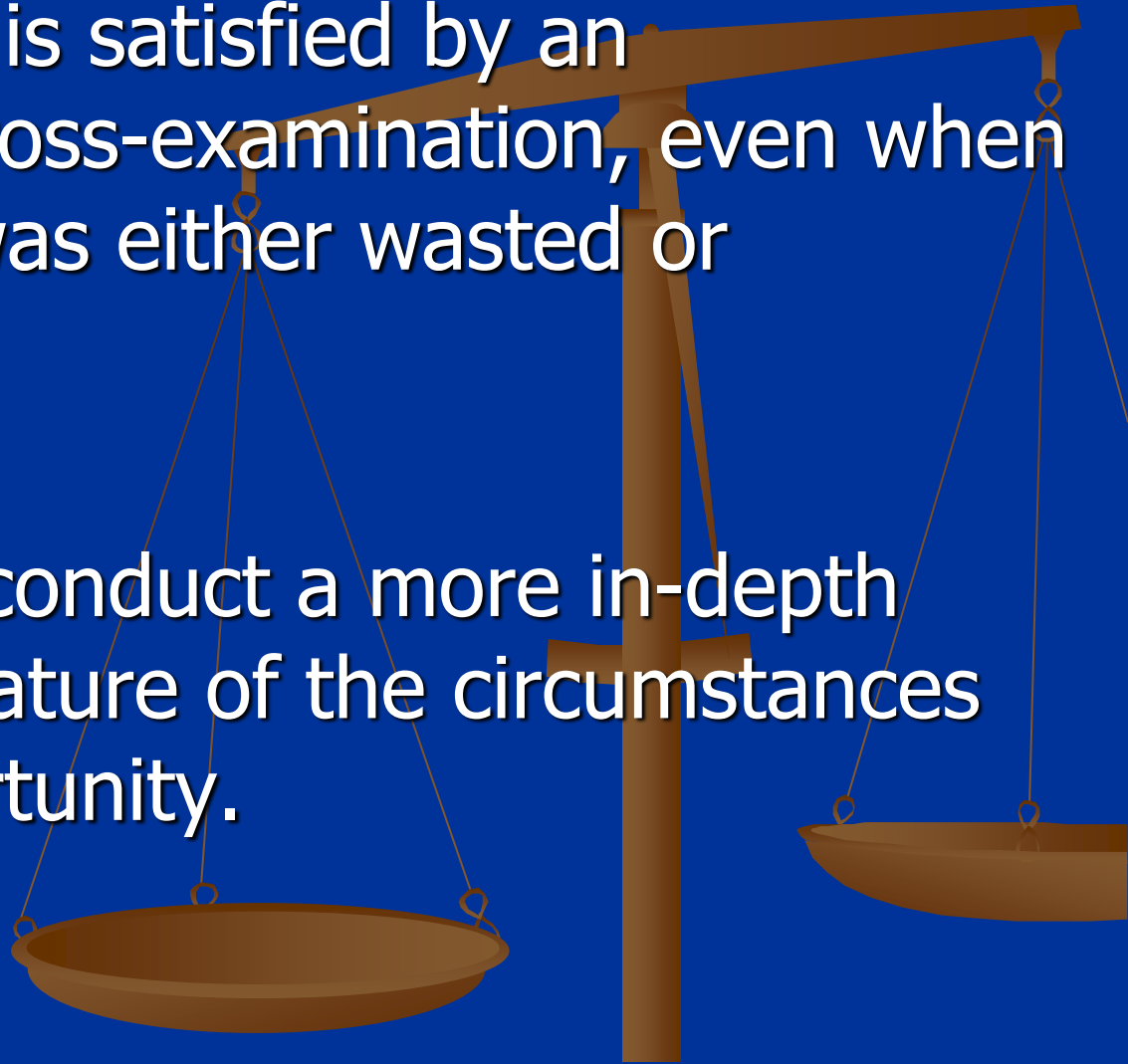


A golden scale of justice is centered on a solid blue background. The scale is tilted, with the right pan lower than the left. The text is overlaid on the scale's frame.

Prior Opportunity for Cross-Examination

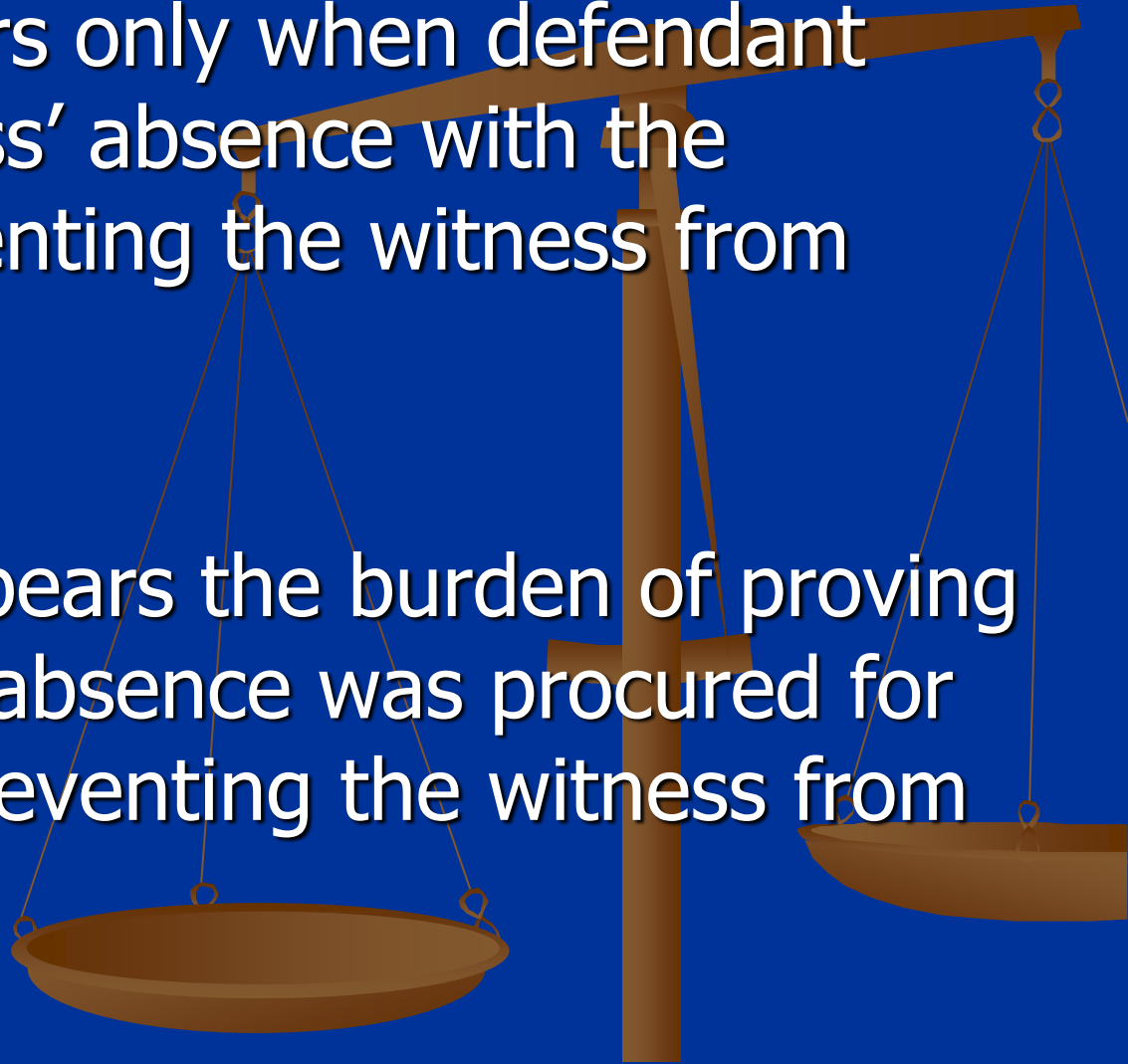
Practice Pointer

- The general rule is that the prior opportunity to cross-examine is satisfied by an opportunity for cross-examination, even when the opportunity was either wasted or misspent.
- But some courts conduct a more in-depth inquiry into the nature of the circumstances of the prior opportunity.



Practice Pointer

- Forfeiture of the right to confrontation by wrongdoing occurs only when defendant causes the witness' absence with the intention of preventing the witness from testifying at trial.
- The prosecution bears the burden of proving that the witness' absence was procured for the purpose of preventing the witness from testifying.



Testimonial and Non-Testimonial Statements after *Williams*

Alito, Roberts, Kennedy

“Out –of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth.”

Alternatively, “the report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose.”

Breyer

Absent, reargument, reports should be presumptively outside CC protection, subject to rebuttal by defense who may call witness and cross at trial; are created by accredited labs, “operating at a remove from investigation;” satisfies hearsay exception;

Thomas

“[S]tatements lacked the requisite ‘formality and solemnity’ to be considered ‘testimonial.’”

“[Statements introduced to explain basis of expert’s opinion are not introduced for a plausible nonhearsay purpose”

Kagan, Scalia, Ginsburg, Sotomayor

When State introduces substance of a lab report into evidence, analyst who generated report is witness who defendant has a right to confront.

When an expert repeats the statement as the basis for a conclusion, the statement’ utility depends upon its truth.

Written Reports Testimonial and Non-Testimonial Statements after *Williams*

Alito, Roberts, Kennedy	Breyer	Thomas	Kagan, Scalia, Ginsburg Sotomayor
<p>“Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth.”</p> <p>Alternatively, “the report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose.”</p>	<p>Absent reargument, reports should be presumptively outside CC protection, subject to rebuttal by defense who may call witness and cross at trial; are created by accredited labs, “operating at a remove from investigation;” satisfies hearsay exception;</p>	<p>“[S]tatements lacked the requisite ‘formality and solemnity’ to be considered ‘testimonial.’”</p> <p>“[Statements introduced to explain basis of expert’s opinion are not introduced for a plausible nonhearsay purpose.”</p>	<p>When State introduces substance of a lab report into evidence, analyst who generated report is witness whom defendant has a right to confront.</p> <p>When an expert repeats the statement as the basis for a conclusion, the statements’ utility depends upon its truth.</p>

Practice Pointer

- Confrontation and hearsay analyses are different.
- Statement may be admissible as a hearsay exception, yet violate the Confrontation Clause or may not violate the Confrontation Clause, yet be inadmissible hearsay

